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Tagore Law Lectures—1873.

THE MUHAMMADAN LAW:

BEING

A DIGEST OF THE LAW APPLICABLE ESPECIALLY TO THE SUNNÍS OF INDIA.

BY

SHAMA CHURUN SIRCAR,

TAGORE PROFESSOR OF LAW.

"—— ad hoc, de quo agitur, non quærimus gentem, ingenia quærimus."

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PREFACE.

THE principles of Muhammadan law contained in these pages constitute the Lectures delivered by me as "The Tagore Professor of Law" appointed by the Senate of the Calcutta University. These principles are, for the most part, derived from several of the Arabic books of paramount authority.—The principles of the law of Inheritance have been drawn mainly from the Sirájiyyah and Sharífiyyah, the highest authorities on the subject,* and where they appeared deficient in any respect, recourse was had to the Fatáwá-i Alamgírí, Fatáwá-i Sirájiyyah, Durr-ul-Mukhtár and other works of unquestionable authority to supplement the deficiency.† The principles respecting the other subjects treated of in this work have been deduced principally from the Hidáyah and the Fatáwá-i Alamgírí, and occasionally from Sharh-ul-Vikayáh, Jámi-ur-Ramúz and other works of great weight. Other passages from the abovementioned authorities have been appended to almost all those principles to explain and illustrate their meanings. To these again have been added annotations, which being passages from books of high authority serve as authorities or additional authorities (as the case may be) for the principles to which they refer. Then under all these are given foot notes, which cannot fail of being interesting or useful.

* See the Introductory Discourse, pages 48 & 49.

† *Vide*, for instance, pages 128—132.

Again all these different matters are so arranged and printed as to be easily distinguishable from one another, and not to put the reader into confusion.* He may refer to them, or to any of them, in case of his considering any of the principles not sufficient by itself, or his requiring authorities or further authorities for the same. Although the Sirájiyyah is considered to be very brief and abstruse,† yet the passages from this authority, which are used in the present work, can no longer be complained of being so; since I have regularly translated Sharíf's commentary on almost every one of the passages of the Sirájiyyah herein contained, and have inserted the same below its text. Thus it will be seen that the desideratum felt by Mr. Baillie and others is now supplied by me in the present work.

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* The principles or texts are, for the above purpose, printed in larger type, and kept clear of the other matters. Then the passages, explanatory and illustrative, are separately printed in a comparatively smaller type. Under these are placed annotations and foot notes in different types and under different lines.

† "The Sirájiyyah," says Mr. Baillie, "is very brief and abstruse; and without the aid of a commentary, or a living teacher to unfold and illustrate its meaning, can with difficulty be understood even by Arabic scholars. With the assistance of the *Sharífiyyah*, it is brought within the most ordinary capacity; and if the abstract translation of that commentary, for which we are also indebted to Sir William Jones, had been more copious, nothing further would have been requisite to give the English reader a complete view of this excellent system of Inheritance."—B. M. L., Pref., page 1.

Strictly speaking, however, the commentary written by Sir William Jones is not even a nabstract translation of the Sharífiyyah, or Sharíf's commentary, but it only gives, though not invariably, the purport of the Sharífiyyah, with illustrations generally from the learned writer's own pen.

In the Introductory Discourse I have given an account of many of the Arabic books of law with a short history of their respective authors from Kashf-uz-Zunún, an Asámí ul-Kutabi wal Fanún, Kashsháfu Istiláhát ul-Funún, Tahzíb ul-Asmá, An-Nabaví, Wafiát ul-Ayán, Ghuníyat ut-Tàlibín, Makhzan-i Afghání and several other works. I have, however, to thank Mr. Morley for his saving me the trouble of translating several of the passages of the first mentioned work, which I found in his Digest (vol. i) rendered into English from the Latin version of Professor Gustavus Fluegel, to which also I had to refer occasionally.*

Mindful of the justness of the opinion expressed by the Commissioners appointed under the first Royal Commission issued for considering "the Reform of the Judicial Establishments, Judicial Procedure, and Laws of India,"† and conscious of such being the fact, I have not inserted in the present work any matter that is not authentic. The principles, explanations, illustrations, and annota-

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* *Vide* Annotations at page 17 and the foot note at page 66 of the Introductory Discourse.

† The first Royal Commission was issued for considering "the Reform of the Judicial Establishments, Judicial Procedure, and Laws of India;" and it did not seem improbable that the subject of the Muhammadan law might, at some period of their labours, come under the view of the Commissioners. But, in their second Report, they gave it as their opinion that—"no portion either of the Muhammadan law or of the Hindú law ought to be enacted as such, in any form, by a British Legislature;" assigning as one of their reasons, that —"a Code of Muhammadan law, or a Digest of any part of that law, would not be entitled to be regarded by Muhammadans as the very law itself, but merely as an exposition of law which might possibly be incorrect."—B. Dig., Introd., page xxiii.

tions are, almost all of them, versions of passages from Arabic books*—books that are of very high authority, as already noticed.

In quoting the important passages from the Fatáwá-i Alamgírí, I could not help taking and adopting Mr. Niell Baillie's translation of the same, partly because it is very difficult to make a more accurate translation of the work, and partly because when his version is used as an authority, it is not advisable to introduce a new one, which, even if done accurately, could not, in my opinion, differ from the above, except perhaps in style, and in the use of some synonymous or corresponding terms. I have, therefore, to offer my grateful thanks to the learned gentleman, not only for the aid I have received from his excellent work, but also for his having rendered to the public very valuable assistance by translating almost all the important parts of the Fatáwá-i Alamgírí, which is one of the three greatest authorities in India, and without which scarcely any *fatwá* (law opinion) can be given on any difficult point of law, excepting on Inheritance.

The few principles which have been laid down by the Privy Council and the highest Courts in India upon the

* Of these, as the Hidáyah and Sirájiyyah have been already translated, and as those translations are passed as authorities, I had to adopt the same in the present work, though not without collating them with their originals, and rectifying the parts which appeared to me erroneous. And here I take the opportunity to observe that the translation of the Fatwás in the Hidáyah, which almost always form the first part of particular paragraphs, generally give the meaning of the original. It is the argumentative parts which often do not agree with the original, and in which are to be found the interpolations, alterations and deviations so much complained of.

opinion of the appointed law officers, have also been included in these Lectures, as well as some of the important precedents.

In short, I have endeavoured to collect and incorporate in the present work all that appeared to me important, taking great care not to leave out anything that is useful; so much so, that some of the Lectures, especially the Lecture on Divorce, would, at first sight, appear rather redundant; but if the reader will read the law of Divorce, at least in Hamilton's Hidáyah and Baillie's Digest, he will find that, in the former it extends over 218 pages, and in the latter it is covered by 156 pages; that there are scarcely any general rules on the subject, but peculiar phrases, sentences, and terms expressive or implicative of the husband's intention, which, used once or repeatedly at a particular time or times, effect one or two divorces revocable or irrevocable, or three divorces. These sentences, phrases, and terms, though very numerous, are, almost all of them, inserted in the Fatáwá-i Alamgírí, and for the greater part in the Hidáyah. It is impossible, therefore, to frame general rules showing as to how one or two divorces revocable or irrevocable, and how three divorces, take place, and how many divorces are effected at a time. I have nevertheless endeavoured my best to frame rules with respect to the above, and have succeeded in framing a few rules,* and have, in consequence, been obliged to insert separately several of the sentences, phrases and terms which did

* *Vide*, for instance, Rules or Principles, 373, 423 & 424.

not fall under those rules, and yet they seemed important for the determination of cases of similar descriptions. To most of the Lectures are prefixed Preliminary Remarks, which give not only an insight of the law about to be treated of, but often also an abstract of the law itself.

Here I have nothing more to add—having already expressed in the Introductory Discourse and Preliminary Remarks all that I had to say with respect to other matters which formed the subject of a Prefatory or an Introductory Discourse. I, therefore, conclude by observing that as no time and labour have been spared in making the present work replete with useful matters and complete in its kind, and in rendering it adapted for the study of students,* as well as for reference in the conduct of cases and administration of justice, I think I may hope the work will meet the approbation of that august body—the Senate of the University,—and be useful to the Public in proportion to the pains taken by me to execute the same.

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* To learn the laws herein inculcated, the student is required to study mainly the principles,—except those which are not of vital importance. The latter are numbered as follow :—38, 43, 50, 111, 112, 142—160, 198, 233, 234, 235, 249, 281, 298, 310—313, 336—338, 347, 348, 361—372, 379—383, 401, 402, 406—409, 411— 418, 421, 429, 442—444, 463, 465—469, 475, 476, 504—507, 515, 517 and 542.

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A: as *a* in salt.
Á: as *á* in fár.
E: as *e* in there.
I: as *i* in fit.
Í: as *i* in police.
O: as *o* in go.
U: as *u* in bush.
Ú: as *u* in rule.
Y: stands almost quiescent when preceded by *a*, as *bayt*, a house.

ERRATA.

Page 70, line 2, for *extending*, read *extends*.

Page 121, line 25, for *or marriage*, read *or of marriage*.

Page 275, line 22, and in other places, for *umm-ul-wald*, read *um-ul-walad*, and for *umm-i-walad*, read *um-i-walad*.

Page 348, line 28, for *in the husband's possession*, read *be in the husband's possession*.

Page 401, line 6, for *thy business in thy hand*, read *thy business is in thy hand*.

Page 405, line 6, for *authorized*, read *unauthorized*.

Page 432, line 10, for *or her dower*, read *on her dower*.

LECTURE I.

INTRODUCTORY DISCOURSE.

Origin of Muhammadan Law—Its basis, *viz.*, *Ahddís*, *Ijmaa*, and *Kiyds*—Text books, Digests and Commentaries in Arabic—The authors of those works—The four principal tribes, and the different sects of Musulmáns in general—The different sects or classes of the *Sunnís*, their different doctrines, and books inculcating those doctrines—Translations into Persian and English—Digests in English—The people to whom Muhammadan Law applies.

HAVING had the honor to be appointed Tagore-Law-Lecturer by the Senate of the Calcutta University, I have been asked to deliver lectures on the Muhammadan Law, "which," to use the words of Sir William Jones, "is locked up, for the most part, in a very difficult language, Arabic, which few Europeans will ever learn."* This law had no existence before Muhammad became a Prophet. History tells us, that Muhammad was born at Mecca in the year of Christ 570, and that, after the age of twenty-five years, he spent much of his time in solitude, making a lonely cave his abode, where he is said to have been occupied in prayer and meditation. He became a Prophet at the fortieth year of his age, when, finding his countrymen, in general, slaves to idolatry, he devoted himself to replanting (as he expressed it) the only true and ancient religion, professed by Adam, Noah, Abraham, Moses, Jesus, and all the Prophets.† In his endeavours to this end, he met with the most bitter persecution from the idolators whose faith he attacked. He was abused, spat upon,

* *Vide* Preface to Colebrooke's Digest.

† *Vide* Sale's *Kurán*, chapter ii.

LECTURE I. covered with dust, and dragged from the temple of Mecca* by the hair of his head; but still he assiduously persevered in his undertaking, and ultimately succeeded in spreading his religion and power over a great portion of the Roman Empire, in converting the people of Persia, in advancing his dominion to the banks of the Indus and the Oxus, and in founding a sect of people that afterwards became the conquerors of India, and are at the present time one of the most numerous, if not the most powerful, races of men on the face of the earth.

Before his time there was no general law of the races inhabiting the Arabian Peninsula. Each tribe was governed by its own laws, and matters in dispute were either referred to the determination of the chief, or (more frequently) decided by an appeal to the sword. The sciences chiefly cultivated by them were—those of their genealogies and history, such knowledge of the stars as to foretell the changes of the weather, and the interpretation of dreams. Their only lasting memorials were the songs of their poets, transmitted orally from age to

* The traditions of the Arabs represent this temple, which they call "*Kaaba*" (place of worship or devotion), to be almost *coeval* with the world. It was, they say, first built, under the station of the original Kaaba in heaven, by Adam, who from that period made it his own Kaaba. After his death, his son Seth erected upon the same place a building, which, being destroyed by the deluge, was afterwards re-built by Abraham and his son Ismael, who married a daughter of Modad, a descendant of Jorham, and thus became the progenitor of the Koresh race to which belonged Muhammad as well as many nobles of Arabia, and members of which race now abound in Arabia and are to be found in some other parts of the world. The Koresh obtained possession of the above, and kept it in repair for several generations. In the infancy of Muhammad the old temple having fallen, or being pulled down, a new one was erected on the same foundation and after the same model. Again, in the twenty-fourth year of the Hijrah, the temple in question, sustaining some damage from the zeal of the Musulmán reformers, in clearing it of the idols and images of fanatic worship, placed therein by Arabians and Egyptians, was once more pulled down and re-built, as it now stands, by Abú Yusuf Ibn ul-Hijáj, the then Sharíf of Mecca.—See *Hidáyah*, Prel. Disc., p. lvi.

age. These served to preserve ancient usages, or to keep alive the feuds of contending neighbours. The art of writing was little known, and the practice of it was confined chiefly to the Jews and Christians, who were distinguished by the common appellation of 'Kitábís' (Scripturists). In such a state of society was promulgated the law of Muhammad. The origin of this law is '*Al-Kurán*' or '*The Kurán*;'* and *the Kurán* is believed by the orthodox Musulmáns to have existed from eternity, subsisting in the very essence of God. The Prophet himself declared that it was revealed to him by the angel Gabriel in various portions, and at different times. Its texts are held by the Muhammadans to be unquestionable and decisive, as being the words of God (Kalám-ulláh), transmitted to man through their Prophet, or, as he is emphatically called (by the believers,) "the last† of Prophets, Muhammad, the Apostle of God." Besides inculcating religion and theology, the *Kurán* contains also passages which are applicable to jurisprudence, and form the principal basis of the *Sharaa*. Thus the law of the Musulmáns is founded upon revelation, and blended with their religion, the *Kurán* being the fountain-head and first authority of all their laws, religious, civil, and criminal. But whenever the *Kurán*

Origin of Muhammadan law.

* The word *Kurán*, derived from the verb "*Karaa*" (to gather, to read), signifies properly, reading, or rather that which ought to be read, by which name the Muhammadans denote not only the entire book of the *Kurán*, but also any particular chapter or section of it, just as the Jews call either the whole Scripture, or any part of it, by the name of *Karah*, or *Mikrah*, words of the same origin and import.—*Vide* Sale's *Kurán*.

† The Arabic word rendered "last" is "Khátim," which signifies also a seal; whence, perhaps, the most general expression of the Muhammadan faith, "Khátim-ul-Ambiyá" is wrongly translated in Morley's Digest by "the seal of the Prophets" instead of by "the last of the Prophets," which meaning thereof is given in all the commentaries on the *Kurán*, as well as in the books of Usúl and Hadís, and in which sense alone it is used by all the Muhammadans.

LECTURE I.

was not applicable to any particular case, which happened as the social relations and wants of the Muhammadans became more extended, recourse was had to supplement its silence to the *Sunnat* (*a*) or *Sunnah*,*—that is, to whatever the Prophet had done, said, or tacitly allowed; and also to *Hadís* (*b*),†—that is, to the Prophet's sayings or

Sunnat.

Hadís.

ANNOTATIONS.

(*a*). The '*Sunnat*' is of two kinds: 1, Mowázabat (constant) or Muwakkidah (obligatory); and 2, Záyidah or additional (whence optional). The Sunnat-i-Muwakkidah are acts which the Prophet was generally in the habit of doing, and which it is incumbent on the Muhammadans to follow in practice; while it is optional with them to practise the Sunnat-i Záyidah, as they were not invariably done by the Prophet.

(*b*). Hadís is chiefly divided into two classes, *viz.*, 1, Iláhí (divine) or Kudsí (holy); and 2, Nabaví (prophetic). The Hadís-i Iláhí or Kudsí is said by the Prophet to be from God; while the Hadís-i Nabaví is that which is not so.‡ The Hadís-i Nabaví are again sub-divided into three parts, *viz.*, 1, Hadís-i Koulí (the sayings and precepts of Muhammad); 2, Hadís-i fialí (his doings); and 3, the Hadís-i Takrírí (the doings of the Prophet's companions upheld by him in silence).§

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* When in the nominative case of the singular number, the word 'Sunnat' is commonly pronounced '*Sunnah*.'

† The above significations of Sunnat and Hadís are according to the definitions given in the celebrated book entitled the "Kashsháfu Istiláhát ul-Funún." See *Ibid*, pp. 280 and 703 of the edition published by the Asiatic Society of Calcutta. The general signification of Hadís (pronounced among the Arabs as Hadíth) is an occurrence or event, while its legal signification is as above given. Hadís, though in the singular number (having Ahádís for its plural) is in law generally used in the plural sense.

‡ See "Kashsháfu Istiláhát ul-funún," page 280, published by the Asiatic Society of Calcutta.

§ Indeed, there is a multitude of ahádís or traditions cited by Musulman writers concerning the acts and sayings, not only of the Prophet, but also of his companions, which last, though not of equal authority with those that are from the Prophet himself, are nevertheless admitted to have some weight in judicial decisions, when not contradicted either by the *Kurán* or by Sunnat.—See Preface to Hidáyah, page 10.

the narration* of what was said or done by him, or was in silence upheld by him. All these are considered by the orthodox Muhammadans to be the supplement to the *Kurán*, and nearly of equal authority.† The Sunnat and Hadís never were committed to writing by, or in the time of, the Arabian Legislator. At the time of Muhammad's death, the Sunnat with the *Kurán* formed the whole body of the Law. "I leave with you," said the Prophet, "two things, which, so long as you adhere to them, will preserve you from error. These are the book of God and my Sunnat."

After the death of Muhammad various competitors came forward claiming to succeed to the Khiláfat (*c*),‡ and divided the people into rival and discordant factions.

But, notwithstanding that, the Sunnat, as well as Hadís, was preserved from hand to hand, by authorized persons,

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ANNOTATIONS.

(*c*). Alí, the son-in-law, and the lineal chief of Muhammad's family,§ aspired to the succession of the Khiláfat, with hopes founded not less on his personal merits, than on his nearest relationship and hereditary claims. But the followers of his father-in-law became divided into several factions, and after much contention Abú Bakr, the father-in-law of Muhammad, was elected by the elders, and acknow-

---

* Whence Hadís is also called 'Rawáyet,' and rendered in English by 'traditions.'

† "The *Kurán* and *Sunnah*," says Mr. Morley, "stand in the same relation to each other as the Mikrah and Mishnah of the Jews; and it may be remarked that the words both in the Arabic and Hebrew languages are derived from similar roots, and have the same significations."—Morl. Dig., Int., p. ccxxvii.

‡ 'Khiláfat' signifies viceregency, lieutenancy, as well as imperial dignity.

§ Alí Bin Abú Tálib was the cousin-german of Muhammad, and with him descended from Háshim Bin Abd ul-Munáf, from whom the Háshimí tribe derives its title.

LECTURE I.

and applied to many questions relating to things, both temporal and spiritual, touched upon in the *Kurán*. After Muhammad's death, the Sunnat and Hadís, though not recorded, were cited by his surviving companions* in order to decide occasional disputes, and to restrain men from certain actions which the Prophet prohibited: and thus, in the process of time, they became the standard of judicial determination.

"The articles of law, or, in other terms, the commandments and prohibitions of God," says Ibnu Khaldún,†

ANNOTATIONS.

ledged by the people, as the successor of their Prophet (Khalífat-ur-Rusúl).‡

Within a little more than two years after his elevation, Abú

---

* Of the companions of the Prophet, the following ten were superior (to others): 1—Abú Bakr, 2—Umar, 3—Usmán, 4—Alí, 5—Talhá, 6—Zubair, 7—Saad, 8—Sayíd, 9—Abú-Ubaidá, and 10—Abd-ur-Rahmán.—See Tahzíb-ul-A´smá, page 19.

But the companions who, before, as well as after, the Prophet's death, gave decisions, were different from the above: the latter were six in number, namely: 1—Abú Hurairah, 2—Abd-ullah Bin Umar, 3—Jábir, 4—Abd-ullah Bin Abbás, 5—Anas, and 6—Aesha. These were the foremost of persons who remembered and related many of the Ahádís (including Sunnats).—See Tahzíb-ul-A´smá, page 352.

† Ibnu Khaldún, *alias* Abd-ur-Rahman Bin Muhammad Hazramí, was the Kází of Halab and author of the compilations collectively entitled the "Ibar," which consists of four parts. He died in A. H. 808. See "Kashf-uz-Zunún," Vol. II, p. 101. The 'Ibar,' aforesaid, has been printed in Egypt, and is available at Calcutta.

‡ 'Khalífat' or 'Khalífah' means a successor, a lieutenant, a deputy; an emperor, a king, prince, sovereign, or monarch. This was the title given to the Muhammadan sovereigns or successors of their Prophet, and to this was annexed the most absolute authority both in religion and civil government. It was first adopted by Abú Bakr (Muhammad's immediate successor), who would accept of no other title than Khalífat-ur-Rasúlullah (the viceregent of the apostle of God), which, together with Amír-ul-muminín (the commander of the faithful) assumed by the succeeding Khalífah Umar, became the principal titles of all the following princes during a period of 636 years, *viz.*, from 622, the commencement of the Hijrah, till the taking of Bagdad, and the final period of their empire, in the year 1258. Khalífat-ullah signifies the viceregent of God, *i. e.*, Ádam.

" were then borne (not in books, but) in the hearts of men, who knew that these maxims drew their origin from the book of God and from the doings and sayings of the Prophet. Under these circumstances, the traditions very soon increased to such an extent that it became not only advisable, but also necessary, to make collections of them,

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Bakr, being attacked with a mortal distemper, nominated Umar to be his successor, and accordingly the latter succeeded to the dignity of Khalífah, together with which he assumed the title of 'Amír-ul-muminíín (commander of the faithful);' but, after a successful reign of more than ten years, he died of a wound received from one Fíroz, a Persian slave. Upon Umar's death, Alí took the opportunity to urge his superior and exclusive claims to the Khiláfat; but, notwithstanding his opposition, Usmán was proclaimed and recognized as successor to the Prophet and sovereign of the Muhammadans. Alí, on this his second defeat, acted with moderation, which, however laudable to himself, was much blamed by some of his adherents. The insurgents, after a short time, murdered the unfortunate Usmán, and offered the Khiláfat to Alí, who accepted it with the consent of his colleagues. In obtaining, however, this long sought object, Alí found himself upon a tempestuous ocean, and the storm ended with his life.

On the death of Alí, Hasan, his son by Fátimá, the daughter of Muhammad, was, by his father's adherents, proclaimed the Khalífah (or sovereign); but Mowáviyah, who was descended from Abd-ul-Munáf, the common ancestor of the Prophet as well as of Alí and Usmán, and from the same branch as Usmán, and who had already assumed the dignity of Khalífah in Egypt and Syria, and was in possession of those countries, refused to acknowledge Hasan as Khalífah; and thence arose a new competition which would not have failed to re-kindle the flame of war, had not Hasan decided to relinquish his claims in favor of his rival, and thus the dignity of the Khalífah passed from the branch of Háshim to that of Usmán. Upon resigning the Khiláfat, Hasan retired to Medina, and there lived in privacy until A. H. 49, when he died, poisoned, as the Shíahs allege, by his wife, at the instance of Mowáviyah, who dreaded the possibility of his pretensions being renewed.

Husén, the younger brother of Hasan, on the death of Mowáviyah, refused to acknowledge his son Yazíd, and thereupon he was constrained

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and to separate those which were authentic from those which were of doubtful authority."

The first attempt to reduce into writing the Sunnah and Ahádís or traditions appears to have been made by Abdullah Bin Abbás. "It is reported," says the author of Al-Isábah fí Tamízi as-Sihábah,* "by Abdullah Bin Alí from Abú Ráfi,† that Abdulláh Ibnu Abbás‡ used to come to the latter (Abú Ráfi), and he used to narrate to him (Abd-ulláh Ibnu Abbás) what the Prophet did on particular days, and Ibnu Abbás used to write down in a book (which he had with him) what was narrated by Abú Ráfi. Abdulláh Ibnu Abbás has also written a brief commentary on the *Kurán*, which itself was not entirely and systematically reduced to writing (*d*) until the reign of

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to retire for safety from Medina to Mecca, where he received an invitation from his father's adherents at Kúfah. Yazíd, understanding that Husén had accepted this invitation and set out from Mecca to Kúfah, despatched Ubéd-ullah, one of his commanders, to intercept him, and Ubéd-ullah, meeting him as he was traversing the plain of Karbalá, with only seventy-three of his family and attendants, cut to pieces the Prophet's grandson (Husén), and almost the whole of his small party. In this indiscriminate massacre perished also four other sons of Alí, *viz.*, Abdulla, Abbás, Usmán, and Jáfir, together with one or more of his daughters.§ The wretched remains of his family were afterwards brought before Yazíd, who, however, dismissed the captives with honor to their own place.

(*d*). The *Kurán* was entirely and systematically reduced to writing by the persons and under the circumstances stated in the subjoined

* A Biographical Dictionary respecting Muhammad's companions. The first part of this work has been printed by the Asiatic Society of Calcutta.

† Abú Ráfi was a companion of the Prophet.

‡ Abd-ullah Ibnu Abbás Bin Abd-ul-Muttalib Bin Háshim Bin Abdul Munáf was a cousin of the Prophet (father's brother's son). He died in A. H. 68, at the age of 72.

§ The Shíahs still mourn and commemorate the deaths of Hasan and Husén with great solemnity annually, in the month of Muharram, whence the name of the ceremony.

Usmán,* the third successor of the Prophet. This commentary is still extant and has lately been printed at Delhi. Since that to the time of Abú Hanífah (who was born A. H. 80 and died in 150), collections of traditions appear to have been made by Urwah Bin Zubair (who was one of the then seven famous doctors), Ash-Shábí A'mir Bin Shurahbíl Maimún Bin Mahram, Az-Zuhrí,† LECTURE I.

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passages contained in the most famous and authentic work of Bukhárí entitled the Jámia-us-Sahíh (*post*, p. 19), and in the Itkán. "Zayid, the son of Sábit, said: 'I was sent for by Abú Bakr in the year in which the battle of Imámah was fought. Upon my arrival, I saw Umar seated near Abú Bakr, when the latter thus addressed (me):—'Umar said, that the battle of Imámah has destroyed several of the readers (who knew the *Kurán* by heart), and he is afraid the others also may be destroyed in other battles, and then many parts of the *Kurán* will be lost. He is, therefore, of opinion that I should order (the different parts of) the *Kurán* to be collected. To this I replied: How could I do that which the Prophet of God has not done? But after much discussion, I have agreed.' Then he said to me: 'You are an intelligent young man: you had to write, during the Prophet's lifetime, (portions of) the *Kurán*; you must, therefore, make search and collect (the different parts of) the *Kurán*.' Thereupon I said in my mind—this task, which is imposed on me, is more onerous than to lift up a mountain, and replied, 'How do you two wish me to do an act which the Prophet did not do?' To this Abú Bakr replied, 'for God's sake, this is a very laudable act.' Then I undertook the task, and began to collect (the portions of) the *Kurán*, (which were written) on pieces of paper, stone, and on leaves, as well as from the memory of the persons who had borne the same in heart. These collections remained with Abú Bakr until he died, and upon his death they remained with Umar, and when he died, they were in the possession of the Prophet's widow Hafsá, the daughter of Umar."—Taisíl-ul-Usúl,‡ page 88.

* The reign of Usmán commenced after a little more than thirteen years from the death of Muhammad.

† Az-Zuhrí was the family-name of Muhammad Bin Muslim who was the son of Ubedullah Bin Abdullah Bin Shiháb Az-Zuhrí. See Ibnu Khallikán, Vol. VI, p. 97, and Asmá-ur-Rijál.

‡ This book was printed in Calcutta by Hakím Maulaví Abd-ul Majíd A. H. 1252.

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Muhammad Bin Muslim, Hisám Bin Urwah Bin Zubair and others, all of whom flourished between A. H. 94 and A. H. 124. I have not been able to learn from any of the Arabic works, which I have been able to obtain, whether the collections made by them, and the interpretations and expositions of the law that were then given, were reduced to writing.*

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"Another Hadís, or tradition, related from Anas (a servant of the Prophet) is, that one Huzaifah (who was a Sihábí†) came to Usmán (the then Khalífah,) and said: 'Oh Amír-ul-Muminín (commander of the faithful)! protect the Ummat (the believers) before they be of different opinions in (respect of) their Book (the *Kurán*), as the Jews and Christians have been in (respect of) their respective books.' Thereupon Usmán sent a person to Hafsá requesting her to send to him the (already collected) portions of the *Kurán* that he might copy them out. She accordingly sent them to him. Then Usmán ordered Zayid Ibnu Sábit, Abd-ullah Bin Zubair, Sayíd Bin al-A's, and Abd-ullah Bin Hárith to copy them; he also directed them to use the Kureshí spelling and pronunciation,‡ where they differed in that respect. They were accordingly written, and copies thereof were sent to different countries. Usmán then ordered that all (such) writings, except the copies as above, might be destroyed."—*Ibid.*

It is stated in the Itkán§ that Usmán with his own hand made seven copies (of the *Kurán*), of which, he sent one copy to Mecca, one to Syriá, one to Yaman, one to Bahrain, one to Basrah, one to Kúfah, and one copy he shut up in Medina." Page 141.

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* Mr. Morley, however, says:—"The first attempt of this kind appears to have been made by Ibnu Shiháb Az-Zuhrí, during the Khiláfat of Umar Ibnu Abd-ul-Azíz" (Morl. Introd., p. cclxii); and, as authority for this, he cites De Slane in Ibnu Khall. Vol. I., Introd. p. xviii. But it appears from Asmá-ur-Rijál and some other biographical works that Urwah Ash-Shábí and Maymún, who were born and died before Az-Zuhrí, had collected traditions previously to Az-Zuhrí, and that Abd-ullah Ibnu Abbás had made a collection of traditions and reduced them to writing before all of them.

† Any person who saw the Prophet even for a moment is denominated a "Sihábí," though he may not have conversed with him.—Tahzíb-ul-ásmá, page 18.

‡ Because the *Kurán* is said to be revealed in the Kureshí dialect.

§ The full name of this book is "Al-Itkán fí Ilum-ul-*Kurán* li as-Sayútí." This book has been printed and published by the Asiatic Society of Calcutta.

Although the *Kurán* was believed and received by all the Muhammadans as the words of the Most High, yet the discrepant interpretations of many of the material parts thereof given by the different expositors, the difference of opinion among the learned as to the principles or articles of faith (usúl), the admission of particular Ahádís by some doctors, and the rejection of the same by others, also the difference in the acknowledgment of a particular person or persons as being the Imám or Imáms, created different sets of doctrines; and the followers of each of such sets constituted a particular sect. The sects so formed are seventy-three in number. Of these seventy-three sects, ten are stated in the Ghuníyat ut-Tálibín to be the principal, namely,— 1—The Sunní;* 2—Khárijí; 3—Shíah;* 4—Muatizilí;

Different sects.

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* With respect to the formation of the Shíah and Sunní sects the learned Translator of the Hidáyah observes, "Abú Hanífah was educated in the tenets of the Shíahs. He received his first instructions in jurisprudence at Baghdad, from Imàm Abú Jáfir, an eminent Doctor of that sect, and heard traditions chiefly from Abú Abd-ullah Ibnu al-Mubárak, both of whose authorities he frequently quotes. After having finished his studies and gained considerable reputation at Baghdad, he returned to Kúfah, and distinguished himself by seceding from his master Abú Jáfir, and teaching civil law on principles repugnant to those inculcated by that Doctor. His defection indeed is, by the Shíahs, attributed to motives which, if true, divest him of the merit of proceeding in this upon internal conviction. They relate that Abú Jáfir's eminent piety, learning, and austerity of manners having attached to him a considerable number of followers; the increase of his reputation alarmed the reigning Khalífah, who, in order to destroy his credit, gained over Hanífah, by promising him to support, with all the influence of Government, his opinions and decisions against those of Abú Jáfir, and that Hanífah, allured by the offer, quitted his preceptor, and instituted a school in opposition to him. Whether they be correct in this statement or not, it is certain that the dissension which took place between these eminent lawyers is considered as the origin of the different tenets of the Shíahs and Sunnís in jurisprudence."—Hidáyah, Prel. Disc., p. xxiii.

The above appears to have been taken from a book of the Shíahs, as according to the Sunnís there was no such Imám as Abú Jáfir.

Mr. Morley, on the other hand, says: "The dissensions that arose on the death of the Prophet with regard to the succession of the Khiláfat, were revived with renewed fury, when, on the murder of Usmán, the noble and unfortunate Alí succeeded to the dignity of Amír-ul-Muminín (commander of the faithful), and they eventually caused the division of Islám into two

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5—Murjiyah; 6—Mushabbihah; 7—Juhmiyah; 8—Zarárіyah; 9—Najjáriyah; and 10—Kilábiyah. Of these, the Sunnís constitute but one general sect, the Khárijís* are sub-divided into fifteen classes, the Muatizilís into six, the Murjiyahs into twelve, and the Shíahs into thirty-two;†

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great parties or sects, called respectively the Sunnís and Shíahs, who differ materially in the interpretation of the *Kurán*, and in admitting or rejecting various portions of the oral law." See his Digest, Vol. I, Introd., p. ccxxix.

But he does not say from what book he deduced the above. The Lecturer has made a great search in most of the leading books in Arabic, but has failed to find the same. The opinion in question is perhaps founded upon the notion which is still afloat among the people, not conversant with the sacred writings of the Mussulmáns.

Moreover, at the foot note appended to the above passage, the learned compiler adds: "The word Shíah, which signifies sectaries, or adherents in general, was used to designate the followers of Alí as early as the 4th Century of the Hijrah." (Introd., p. ccxxix.) But this appears to be inconsistent, inasmuch as the name of one of the seventy-three sects into which the Muhammadans were divided after the death of their Prophet is Shíah, (see *ante*, p. 11), and it will be found on reference to the book entitled the Milal wa Nahal (a work of very high authority), as well as other works of the same nature, that one of the articles of the Shíah creed is to acknowledge (not any other companion, but) Alí alone to be the lawful successor of the Prophet, and the sole Imám or Amír-ul-Muminín. This much is manifest from the following passage contained in the learned compiler's own book. "The Shíahs assert that Alí was the only lawful successor of the Prophet, and that both the Imámat and Khiláfat,—that is, the supreme, spiritual and temporal authority,—devolved of right upon him and his posterity, notwithstanding that they were actually and unjustly ousted by the Khalífahs of the Banú Umayyah and Banú Abbás." (Morl. Dig., Introd., p. ccxxxiii.) How, then, in the fourth century of the Hijree era, could the word Shíah be used for the first time to designate the followers of Alí, when the members of that sect were called Shíah from the very beginning of the formation of their sect, and it was one of the articles of their creed to acknowledge none but Alí and his descendants to be their Imáms?

* The Khárijís are they who depart or revolt from the lawful Khalífah established by public consent; and hence comes their name which signifies revolters, or rebels. The Khárijís first revolted from Alí in the 37th year of the Hijrah. The opponents of the Khárijís are, therefore, the Shíahs, whose name properly signifies sectaries or adherents in general, but is peculiarly used to denote those of Alí, son-in-law of Muhammad, for they maintain that he alone was the lawful successor of the Prophet; and that the supreme authority, both in spirituals and temporals, belongs of right, to his descendants, by his wife Fátimah, daughter of Muhammad.—*Vide* Sale's *Kurán*, Preliminary Discourse.

† Of the thirty-two classes of the Shíahs, two are principal, namely, the Shiah and Ráfizí classes, the latter of whom are divided into three sects, denominated, 1, Ghálíah, 2, Zaidíah, and 3, Ráfizíah, which (last) is sub-divided into twelve, of whom the chief are the Imámiyah and Ismáiliyah.

and the Juhmiyahs, Najjáriyahs, Zaráriyahs, and Kilábiyahs form one sect each.*

The author of the Kashsháfu Istiláhát-ul-Funún, upon the authority of Sayid Sharíf, author of the Sharh-i Muakkif, puts all these sects under two heads; 1—The Ahli Sunnat or Sunnís (traditionists); and 2—Ahli Hawá (free-thinkers). He then divides the latter into six principal sects, namely, 1—Jabriyah, 2—Kadriyah, 3—Ráfizí, 4—Khárijí, 5—Muattilah, and 6—Mushabbihah; and each of these he sub-divides into twelve sects, which, *plus* the Sunní, amount to seventy-three, as enumerated in the above and other books.†

No caste distinction.

But though divided into different sects as above stated, the Musalmáns have no caste distinction among them (as the Hindús have). True, a notion is afloat, particularly in India, that the Muhammadans are principally divided into four castes, *viz.*, the Shaykh, Sáyyid, Mughal and Pattán, but there is no foundation for the opinion. The word

* Several sects, besides the Shíah and Sunní, are still in existence. The people who belong to the tribe of Buhrá are of the Ismáilí sect; they principally live in Bombay, whence some have come to Calcutta also. The present Imám of this sect is named A'ghá Khán, who is married to the sister of Násir-ud-dín Sháh, the reigning king of Persia. The people of Muscat with their king belong to the Khárijí sect. The people belonging to the Zaidiyah and other sects live in the Arabian coasts.

† "The Sunnís by a general name," says the learned Translator of the *Kurán*, "are called traditionists, because they acknowledge the authority of the Sunnah, which is a sort of supplement to the *Kurán*, directing the observance of several things omitted in that book, and, in name, as well as in design, answering to the *Meshna* of the Jews."

The Musulmán writers assert that these divisions among them took place to fulfil a prophecy of Muhammad, who said: "The children of Israel were divided into seventy-one sects, all of whom, excepting one, are doomed to hell-fire. My people (Ummat) also will hereafter be divided into seventy-three sects, all of whom, except one, shall be Nárí (doomed to hell-fire.)" Then being asked "which is *that* one sect," he replied, "It is that which believes and acts as I, and my companions, do." (A Hadís narrated by Abd-ullah Bin Zayid from Abdullah Bin Umar, and contained in the book entitled the 'Ghuniyat-ut-Tálibín' composed by Shaikh Muhí-ud-Dín Abd-ul-KádirJílání.)

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Sayyid, which signifies 'a lord, a prince, a chief, or head,' was applied to Muhammad; as 'Sayyid-ul-anám,' the prince of mankind and of all living creatures, *i. e.*, Muhammad; 'Sayyid-ul-Bashar,' the prince of mortals; 'Sayyid-ul-Mursalín,' the head of the apostles. But, subsequently, this title of Sayyid was given to the (male) descendants of Alí by Fátimah, daughter of Muhammad. As to the term 'Shaykh,' it was originally applied to a learned and venerable old man, the word itself signifying 'one learned in religion and law, a man of authority, a chief, a prelate, a superior of the Darvishes or Muhammadan monks;' as Shaykh-ul-Islám, the head of religion, *i. e.*, the high priest; the Muftí, the Patriarch; Shayk-ush-Shayúkh, the chief of the Shaykhs or doctors; Shaykh-ul-Mursalím, the patriarch Noah; Shaykh-un-Nár, the chief of the fire, *i. e.*, the Satán. But in India, more especially in Bengal, a man is generally called 'Shaykh' who has no other title. The descendants of Mughal Khán, brother of Tátár Khán, both of whom were the sons of Alanjah Khán, the son of Kyán Khán, the son of Zéb Bátúí Khán, the son of Almanjah Khán, the son of Turk, one of the three sons of Noah, were called Mughals after the name of their ancestor Mughal Khán. The great Mughal Tímúr or Tímúri-lang (Tamerlane) as well as Changes Khán, having descended from a woman named Alan-kowah who belonged to the family of Kyán Khán, the sixth in descent from Mughal Khán, were called Mughals; and Tímúr being called a Mughal, all his descendants (including the great Akbar) down to the last king of Delhi were also called Mughals.* The natives

Sayyid.

Shaykh.

Mughal.

* See Makhzan-i Afghání, a celebrated history in Persian. See also the Táríkh-i Firishtah, which too is a Persian history of great repute, and which was chiefly consulted by Elphinstone in treating of the Mughals, Afgháns, and other Musulmáns.

of Irán, Túran, and Sceithia, or Transaxonia too are called Mughals, as well as the Tartars and Georgian Christians.*

Afgháns or Pattáns.

As respects the Afgháns, it is stated in the history entitled the Makhzan-i Afghání, that there was a person named Afghanah or Afghán who was the son of Armiyah, the grandson of Taloot (Sarool); that when Nebuchardezzar, king of Babylon, came with all his army against Jerusalem, and pitched against it and built forts against it round about, the city being broken up, all the men of war fled,† then the descendants of Afghán came and settled between the mountains of Cabul, Candahar, and Ghiznee, and have been thence called Afgháns after the name of their ancestor. They are also called 'Pattáns,' the origin of which, as stated in the Mukhzan-i Afghání, is, that Kayis, one of the Afghán chiefs, went to the Prophet, Muhammad, and the latter gave him the title of "Battán," which in Persian is written and pronounced as 'Pattán,' the Arabic letter 'B' being usually changed into 'P' in Persian; or the word 'Pattán' may be considered a corruption of Battán in Arabic. The Sayyids, Mughals, and Pattáns may, however, be called tribes in the same manner as persons belonging to some other races are called tribes after the names of their primitive stocks or the founders of their families, such as Banú A'dí (the descendants of Ádí), Banú Tamím (the descendants of Tamím), Banú Háshim (the descendants of Háshim), and Banú Abbás (the descendants of Abbás) are respectively called so, as well as of the Adaví, Tamímí, Háshimí and Abbásí tribes. The so-called different tribes, however, are not different castes in the sense in which the

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* *Vide* Richardson's Arabic and Persian Dictionary.

† See the Old Testament, Jeremiah, Chapter lii, verses 4 and 7.

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term is used by Hindús. There is no legal prohibition against persons of these different tribes intermarrying or taking food from each other's hands. Each of such tribes, as above, does not also form a particular sect, but several of them belong to one or any of the sects already mentioned,* and are governed by the particular doctrines of such sect or sects.

Now every one of the sects, above-mentioned, claims to be *the one* which the Prophet said is not 'Nárí,' but 'Nájí,' or saved.†

The number of works on the sciences of law and religion,‡ which have been written by the doctors of almost all the sects, already mentioned (more especially by those of the Shíah and Sunní sects), according to their respective doctrines, is almost incredibly great—so much so, that the bare enumeration of their titles would fill up an ordinary volume. A reference to Biographical Dictionaries (*a*) will show how numerous are the works written on those subjects.

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(*a*). The Biographical Dictionaries, or works which give descriptions of the law books with their respective authors, are also numerous. There are also many Biographical collections especially devoted to the lives of celebrated Doctors of law, under the title "Tabkát-ul-Fukahá."

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* See the Note at page 11.

† See *ante*, page 13. *Note.*

‡ The sciences of religion and law are seven among the Muhammadans:—1—'Ilm-ul-Karát,' the science of reading the *Kurán*; 2—'Ilm-ut-Tafsír,' the science of interpreting or expounding the *Kurán*; 3—'Ilm-ul-Hadís,' the science of the traditions; 4—'Ilm-ud-Dráyat-ul-Hadís,' the science of critical discrimination in matters of tradition; 5—'Ilmu usúl-ud-dín,' the science of scholastic theology; 6—'Ilmu usúl-ul-Fikah,' the science of the elements or principles of law; 7—'Ilm-ul-Fikah,' the science of practical jurisprudence.

No definite general body of law can be extracted from the works on the above subjects written by the doctors of different sects, inasmuch as these works differ from one another in many of their interpretations and expositions of the *Kurán* (though the *Kurán* itself is the universal and paramount authority with them all), often lay down conflict-

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The most celebrated of the Biographical treatises of the *Sunní* sect are the 'Tahzíb-ul-Ásmá,' and 'Kashf-uz-Zunún An Asámí-ul-Kutabi wal Fánún.' Of these the former is a Biographical Dictiónary of illustrious men: it was composed by Abú Zakariyah Yahiyá An-Navaví, and was edited by Dr. Wüstenfield, (8vo. Göttingen, printed for the Society for the publication of Oriental texts, 1842—1847); and the latter is written by Hájí Khalífah and translated into Latin by Professor Fluegel, and is printed in five volumes (4to. London, for the Oriental Translation Fund of Great Britain and Ireland), in 1835—50.

The Book entitled the "Wafiyát-ul-Ayán" or the lives of celebrated persons by Ibnu Khallikán is a general Biography, which treats of the lives of the authors of the law books with the works written by them, as well as of the other celebrated persons. This work is translated by Baron M. Guckin de Slane, 3 vols. 4to. See Morley's Digest, Introd., p. ccxxvii, note.

The most celebrated of the Tabkát-ul-Fukahá was composed by Abú Ishák ash-Shírází, who died in A. H. 476 (A. C. 1083). A modern history of jurisprudence, or rather of jurists, has been compiled in Hindusthání from the works of Ibnu Khallikán and As-Sayútí by Moulaví Subhán Buksh and was published in Delhi in the year 1848.

There are also special Biographical treatises recording the histories of learned Doctors of each particular sect. Among the Sunnís, the most remarkable works which give an account of the Hanífí lawyers are the Jawáhir-ul-Muziyah fí Tabakát-il-Hanafiyah by Shaikh Muhí-ud-Dín Abd-ul-Kádir Bin Abú-ul-Wafá al-Misrí, who died in A. H. 775 (A. C. 1373), and the Tabakát as-Suníyah fí Tarájim-ul-Hanafiyah, by Moula Takí-ud-Dín Tamímí who died in A. H. 1005 (A. C. 1596); in both of which works the lives are arranged in alphabetical order.

The chief Biographer of the Málikí lawyers was Burhán-ud-Dín Ibrahím Bin Alí Bin Fárhún who died in A. H. 799 (A. C. 1396): his work is entitled the Dibáj-ul-Mazáhib.

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ing principles of law and religion (usúl), do not often agree with one another in the reception and rejection of traditions, and draw different and discrepant conclusions of law.

Employed, however, as I am, to lecture on the laws of the Sunní sect (to which most of the Muhammadans of this country belong), I shall here notice only the traditional compilations and the books of law written by Sunnís.*

Traditional Collections.

The traditional collections which are made in writing before the six Sahíhs (to be presently spoken of), and which are said to be still extant, are the works entitled the Muatta by Málik, the Masnad and Sunnan by Sháfií, and Masnad by Hanbal. The chief authorities in the

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ANNOTATIONS.

There are numerous biographical collections treating of the lives of the principal followers of Sháfií, several of which are entitled Tabakát ash-Sháfiíyah; the one most noted is by Kází Táj-ud-Dín Abd-ul-Wahháb Bin as-Subkí, who died in A. H. 771 (A. C. 1369).

The Tabakát-ul-Hambaliyah comprises the lives of the most famous Doctors of the sect of Ibnu-Hanbal. It was commenced by Kází Abú-al-Husain Bin Abú Yualá al-Farrá who wrote the lives of great men up to A. H. 513. This work was subsequently continued by Shaikh Zain-ud-Dín, Abd-ur-Rahmán Bin Ahmad, commonly called Ibnu Rajab, who added to the above, the biography of the personages up to the year 750. Afterwards Yusuf Bin Hasan al-Mukaddasí added to the above, the lives of illustrious persons up to the year 871, and lastly the work was continued by Takí-ud-Dín. The first, second, and third writers died respectively in A. H. 526, 795, and 871 (A. C. 1131, 1192, and 1266). See Kashf-uz-Zunún, p. 135.

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* The Sunnís or ahli Sunnat (people of the Sunnat) are the Musalmáns who assume to themselves the distinction of orthodox, and are such as maintain the obligatory force of the traditions, in opposition to the innovations of the sectaries: whence they are termed Sunnís or traditionists.—Hidáyah, Prel. Disc., p. xxii.

matters of tradition among the Sunnís are, however, the books which are known by the name "Sihâhi Settah" or six Sahíhs, which signify six collections of correct or authentic traditions. The first of these is the "Jámi us-Sahíh," or, as it is also called, the Sahíh-ul-Bukhárí, from the surname of its author, Abú Abd-ullah Muhammad Bin Ismáíl al-Bunkhárí.* The second is the Masnad-us-Sahíh most generally called the "Sahíh-ul-Muslim," compiled by Abu-ul-Husain Muslim Bin al-Hujáj, Bin Muslim al-Kuréshí, surnamed "An-Níshápúrí."† These two treatises, which pass together by the name of Sahíhain (*i. e.*, the two Sahís or authentic collections of traditions), are the most celebrated of the whole number, and although the first more generally takes precedence of the second, yet the second is preferred to the first by some, especially by the African Doctors. Both of them, however, are cited as paramount authorities.

The six Sahís.

The third of the six Sahís is Jámi-ul-Ilál, by Abú Ísá Muhammad Bin Ísá at-Tirmízí. This work is more generally known by the name of the "Jámi at-Tirmízí, and is also called the "Sunan at-Tirmízí" after the name of its author at-Tirmíz, who was a pupil of al-Bukhárí, and died in A. H. 279 (A. C. 892). The fourth of the

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* Al Bukhárí, the chief Imám in the science of traditions, was born in A. H. 194 (A. C. 809), at Bukhárá, from which city he took his surname 'Al-Bukhárí' and died at the village of Khartank, in the district of Samarkand, in A. H. 256 (A. C. 869). He was principally a pupil of Imám Ibnu-Hanbal. His compilation is stated to comprise upwards of seven thousand traditions which he himself affirmed he had selected from a mass of six hundred thousand after a labour of sixteen years.—Morl. Dig., Introd., p. ccliii.

† This author too was a pupil of Ibun Hanbal. He is considered as almost an equal authority with Bukhárí; and, indeed, by some, especially by the African Doctors, his treatise is preferred to the former. Muslim is said to have composed his work from three hundred thousand traditions. He died at Níshápúr in A. H. 261 (A. C. 874), aged 55 years.—*Ibid*, p. ccliv.

LECTURE I.

six Sahíhs was compiled by Abú Dáúd* Sulaimán Bin al-Ashas, surnamed "Shajistání," which contains four thousand and eight hundred traditions selected from a collection of five hundred thousand made by him. Al-Mujtabah, the abridgment of the collections of traditions by Abú Abd-ur-Rahmán Ahmad Bin Alí Bin Shuhaib an-Nasáí, is the fifth of the six Sahíhs.† The sixth or last of the six Sahíhs is the Kitáb us-Sunan by Abú Abdullah Muhammad Bin Yazíd Bin Májah al-Kazvíní, and is commonly called after its author "The Sunani Ibnu Májah."‡

These six books are generally known by the name of 'Al-Kitáb-us-Sittah fí al-ahádís,' or the six books on the authentic traditions, but the two first, which, as already observed, are styled the Sahíhain or the two authentic collections, are by far the greatest authority. The remaining four are commonly called 'Al-Kutub-ul-Arbaa,' or the four books. Traditions extracted from these six books are distinguished by the authors, who make use of them; those taken from the Sahíhain being called Sahíh, or authentic, whilst those from the four books are called 'Hasan', or respectable, authorities. The latter four,

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* Abú Dáúd was born in A. H. 202 (A. C. 817), and died at Basorah in A. H. 275 (A. C. 888).—Morl. Dig., Introd., p. cclv.

† This author had, at first, compiled a large book on the traditions which is entitled the "Sanan-ul-Kabírhi" but as he himself acknowledged that many of the traditions which he had inserted, were of doubtful authority, he afterwards wrote an abridgment of his great work, omitting all those of questionable authority: and this abridgment which is entitled "Al-Mujtaba" takes its rank as one of the six books of *Sunnah*. An-Nasí was born at Nasá, a city in Khurásán, in A. H. 215 (A. C. 830), and died at Mecca in A. H. 303 (A. C. 915).—*Ibid.*

‡ Ibnu Májah was born in A. H. 209 (A. C. 824), and he died in A. H. 273 (A. C. 686).—*Ibid.*

nevertheless, have greater weight than any other compilations of the traditions.

The Muwatta by Málik Bin Anas, already mentioned, and the collection of traditions called after the name of its author, Abú Muhammad Abd-ullah ad-Dárimí, who died in A. H. 255 (A. C. 868), are considered by some to be respectively entitled to be placed among the six Sahíhs, in the room of the Sunan of Ibnu Májah.

The compilation most celebrated after the six Sahíhs, is the Masábíh us-Sunnat by Abú Muhammad Husain Bin Masuúd ul-Farrá al-Baghaví, who died in A. H. 516 (A. C. 1122). This work is principally extracted from the Six Sahíhs, embodying all the authentic traditions, and omitting those which are in any way doubtful. Al-Baghaví wrote also a work entitled the 'Jama bain us-Sahíhain,' or conjunction of the Two Sahís. The work, bearing the same title, by Abú Abd-ullah Muhammad Al-Humaidí, who died in A. H. 488 (A. C. 1095), includes the collections of Al-Bukhárí and Muslim, and possesses a great reputation; as is also the case with the copious compilation of Abú al-Hasan Razín Bin Muáviyah al-Ábdarí, who died in A. H. 520 (A. C. 1126), and which comprises the works of Al-Bukhárí and Muslim, the Muwatta of Málik, the Jámia at-Tirmízí, and the Sunan of Abú Dáúd, and An-Nasáí.

The collections of Abú al-Hasan Alí Bin Umar ad-Dárikutní, who died in A. H. 385 (A. C. 995), and of Abú Bakr Ahmad Bin al-Husain al-Baihakí who died in A. H. 458 (A. C. 1065), are also of high authority.

After these may be ranked the Jámi al-Usúl by Abú as-Saadat Mubárik Bin Asír al-Jazarí commonly called

LECTURE I.

Ibnu Asír, who died in A. H. 606 (A. C. 1209) as a work having great authority; and the Jámi al-Jawámia of the celebrated Doctor Jalál ud-Dín Abdur-Rahmán Bin Abú Bakr as-Suyútí. All the works of as-Suyútí are held in great estimation by the Sunnís.

The Jámi as-Saghír of as-Suyútí is an abridgment of the Jámi al-Jawámia above noticed.

The Mishkát ul-Masábíh is a new and augmented edition of the Masábíh of al-Farrá al-Baghaví by Shaikh Walí ud-Dín Abú Abd-ullah Muhammad Bin Abd-ullah al-Khatíb who completed his work in A. H. 737 (A. C. 1336). It is a concise collection of traditions, principally taken from the six Sahíhs, and arranged in chapters according to subjects.* The small work of traditions entitled the "Muntakhab-i Bulúgh-ul-Murám" appears to be an abridgment, omitting isnád, (or authorities) contained in the Bulúgh-ul-Murám of Shiháb ud-Dín Abú ul-Fazl Ahmad al-Askalání who died in A. H. 852 (A. C. 1448). This work has been printed here with an interlinear *Urdú* translation.

Another small collection entitled "Labáb ul-Akhbár" containing three hundred and ninety-five authentic traditions was also published here in the year 1837.

In addition to the above-mentioned works, there is an immense number of collections of traditions of greater or

* "This collection," says Mr. Morley, "has been translated by Captain Matthews, and is, I believe, the solitary work that has been as yet published in its entirety, in any European language, on the Ilm-ul-Hadís; a fact that is to be deeply regretted, when we consider how little the Muhammadan religion and laws are understood, and how greatly they depend upon the science of tradition."—Morl. Dig., Introd., p. cclviiii.

less extent, and which are of various authorities according to the reputation of their authors.* These exist in such numbers, that Hájí Khalífah himself, in that great monument of his industry and research, the Kashf uz-Zunún, admits that it would be impossible to enumerate them. *Vide* Morl. Dig., Introd., p. cclvi.

The style of the six Sahís, as well as of the greater number of the rest of the collections, being concise and elliptic, though generally pure and elegant, they could not easily be understood without the aid of commentaries. This led a host of doctors to undertake the task of expounding them. The commentaries written by them upon the works in question are also very numerous, so much so that Hájí Khalífah enumerates upwards of eighty on the first of the six Sahís alone. And from the disciples and followers of the leaders of the Sunní sects have proceeded an immense number of commentaries, some treating of the civil, and some of the canon, law; some comprehending the applications both of the *Kurán* and the *Sunnah*, others being confined solely to the former, others again treating purely of the traditions, and almost all of them differing in their constructions in a variety of points.

Commentaries.

In addition to the *Kurán*, Sunnat and Hadís, there are the *Ijmaa* (concurrence), and *Kiyás* (ratiocination), which respectively form the third and fourth sources of Muhammadan law. The *Ijmaa* is composed of the decisions and determinations of the Prophet's companions (Sahábah), their

Ijmaa or concurrence.

* Some of these are original; but they consist, for the most part, of selections and epitomes, or condensed abridgments of one or more of the principal works, explaining in many instances the difficult words and passages, and illustrating the traditions severally by the opinions and decisions of jurisconsults.—Morl. Dig., Introd., p. cclvi.

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disciples, the pupils of the latter (Tábiún), and other learned men. Like the Sunnat, the *Ijmaa* too was originally preserved in memory by learned men, who made the study and memorial preservation of the Sunnat and *Ijmaa*, as well as of the *Kurán*, their special duty. These learned men were called 'Háfiz'* (preserver in memory), and in communicating their narratives to their disciples they made mention of the persons from and through whom those had successively passed before they came into their possession. This mention is termed Isnád† (support), and according to the credibility attached to the narratives whose names are cited as Isnád, depended the authenticity and authority of the tradition and *Ijmaa* so related.

Kiyás.

The *Kiyás* (ratiocination,) which is the fourth source of the Muhammadan law among the Sunnís, and which consists of analogical deductions derived from a comparison of the *Kurán*, the Hadís and the Ijmaa, when these do not apply either collectively or individually to any particular case, is also allowed, with a greater or less extension of limit, by the different sects of the Sunnís; some, however, refusing its authority altogether (*a*).

ANNOTATIONS.

(*a*). Although the *Kiyás*, as above mentioned, is variously received by the different sects, yet it seems pretty clear from a tradition recorded in the Mishkát-ul-Masábíh, that the exercise of private judgment was acknowledged and authorized by the Prophet himself.—Morl. Dig., Introd., p. ccxxxvii.

* The appellation of Háfiz has been recently given to any one who knows the *Kurán* by heart; but formerly it was used by the Sunní Doctors to designate those who had committed to memory the *Kurán*, the Sunnat and the six Sahíhs or collections of Ahádís, and who could cite the Isnád with discrimination.

† An allegation on the authority of another: whence "support."

Although the *Kurán*, the traditions (or Hadís including Sunnat), the *Ijmaa* and the *Kiyás* are the four sources upon which the law of the Sunnís is based, the *Kurán* being the origin thereof, the *Hadís*, the second in authority to the *Kurán*, the *Ijmaa*, the third, and the *Kiyás*, the fourth; and although these are received in common by the Sunní sect, yet the circumstance of particular traditions being collected by some compilers, and not by others, also that of some traditions being received as authoritative by certain Doctors and rejected by others, also that of different constructions being put to, and interpretations given of, several of the *ahádís* by the commentators thereof, and also that of the Doctors considerably differing in their conclusions, as well as the difference in the exercise of *Kiyás*, has given rise to different sets of opinions or doctrines within the sect itself.

Basis of Muhammadan Law.

ANNOTATIONS.

Alluding to the exercise of the *Kiyás*, as allowed by the chief Sunní sects, Ibnu Khaldún says, "The science of jurisprudence forms two systems,—that of the followers of private judgment and analogy *(Ahl-ur-Ráy wa al-Kiyás)*, who were natives of Irák, and that of the followers of tradition, who were natives of Hijáz. The people of Irák, possessing but few traditions, had recourse to analogical deductions, and attained great proficiency therein, for which reason they are called 'the followers of private judgment;' Imán Abú Hanífah, who was their chief, and had acquired a perfect knowledge of this system, having taught it to his disciples."—*Vide* Morl. Dig. Introd., p. ccxxxix.

The respective weight allowed to the *Kiyás* by Málik, Sháfií, and Ibnu Hanbal is not easily to be ascertained: their disciples were, however, termed 'the followers of traditions (Ahl-us-Sunnat).' Abú ul-Faraj says, that these three doctors seldom resorted to analogical argument, whether manifest or recondite, when they could apply either a positive rule or a tradition. He adds that Abú Dáúd Sulaimán rejected the exercise of reason altogether.—*Ibid.*

LECTURE I.

The followers of each of the above sets of doctrines constituted a particular sect. The sects so formed are

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ANNOTATIONS.

In the first, second, and third centuries of the Hijrah, the principal jurisconsults appear to have founded their practice upon that of their predecessors; but some, venturing to rely upon analogical deductions from the first three sources of the law, were called 'Mujtahids,' because they employed the utmost efforts of their minds to attain the right solution of such questions of law as were submitted to their judgment.—Morl. Dig., Introd., p. ccxxxvii.

According to Abú-ul-Faraj, Abú Hanífah was so much inclined to the exercise of reason, that he frequently preferred it, in manifest cases, to traditions of single authority; and his disciples in India have constantly upheld the exercise of the *Kiyás* in an extended form, as is sufficiently notorious and amply proved by certain passages relating to the guidance of Magistrates quoted in the Fatáwá Álamgírí. The first of these passages is from the Muhít of Razí ud-Dín Níshápúrí, and is as follows:—"If the concurrent opinion of the companions be not found in any case which their contemporaries may have agreed upon, the Kází must be guided by the latter: should there be a difference of opinion between the contemporaries, let the Kází compare their arguments, and adopt the judgment he deems preferable. If, however, none of the authorities referred to be forthcoming, and the Kází be a person capable of disquisition (Ijtihád), he may consider in his own mind, what is consonant to the principles of right and justice, and applying the result with a pure intention to the facts and circumstances of the case, let him pass judgment accordingly." The second is taken from the Badáyá of Abú Bakr Bin Masuúd al-Káshání. The same runs thus:—"When there is neither written law, nor concurrence of opinions, for the guidance of the Kází, if he be capable of legal disquisition, and have formed a decisive judgment on the case, he should carry such judgment into effect by his sentence, although other scientific lawyers may differ in opinion from him; for that which, upon deliberate investigation, appears to be right and just, is accepted as such in the sight of God." And again, a third passage is quoted from the last mentioned work:—"If, in any case, the Kází be perplexed by opposite proofs, let him reflect upon the case, and determine as he shall judge right; or for greater certainty, let him consult other able lawyers; and if they differ, after weighing the arguments, let him decide as appears just. Let him not fear or hesitate to act upon

principally four. "The Hanífí, Málikí, Sháfií, and Hanbalí" (*b*). LECTURE I.

Sects of Sunnís.

The founder of the Hanífií sect, which is the first of the four principal sects of Sunnís, is Abú Hanífah Nuamán Bin Sábit al-Kúfí, who was the principal of the Mujtahid (*c*) Imáms,* and who, for decisions, had more Haníff sect.

ANNOTATIONS.

the result of his judgment, after a full and deliberate examination." Passages from other law-books to the same effect are also quoted in the Fátáwá Álamgírí, and the compilers of the latter work concur entirely in the opinions which they cite. In all such cases, however, it is presupposed that the magistrate, so exercising his private judgment, should possess the qualifications of a Mujtahid of the third class.—Morl. Dig., Introd., pp. ccxxxix—ccxli.

(*b*). "Since it appears then," says Mr. Morley, "that the sources of the law are the same, throughout the Muhammadan world, there is a variety in the manner of their reception, and in the laws derived from them, it becomes necessary to describe shortly the principal sects and to state the chief points of difference in their opinions as to the sources of the law." "The Sunnís,—who assume to themselves the appellation of 'Orthodox,' uphold the succession of the Khalífahs, Abú Bakr, Umar, and Usmán, and deny the right of supremacy, either spiritual or temporal, to the posterity of Alí,—are divided into an *infinity* of sects; but of these it will be sufficient, in this place, to notice the four principal only, which agree one with another in matters of faith, but differ slightly in the form of prayer, and more especially with regard to the exercise of the *Kiyás*, and the legal interpretations of the *Kurán* where the latter relates to property." (Morl. Dig., Vol. I., Introd., pp. ccxxix & ccxxx.)

Such, however, does not appear to be the case, as the Sunnís are not divided into an *infinity* of sects (see *ante*, pp. 11—13). They are only subdivided into the four principal sects or classes as above stated and into about four minor sects, all of which, as will be presently stated, do not now exist.—*Vide* post, pp. 32 & 33.

(*c*). 'Mujtahid' is the noun of agency derived from 'Ijtihád.' In

* *Imám* is a leader in religious matters.

LECTURE I.

recourse to *Kiyás* than others. He was born at Kúfah, the ancient capital of Irák in A. H. 80 (A. C. 699) at which time four, or as some authors say, six of the companions of the Prophet, were still living. The doctrines of Abú Hanífah at first prevailed chiefly in Irák; but afterwards became spread over Assyria, Africa, and Máwará an-Nahar. They are at present received partly in Arabia, but very generally throughout Turkey and Tartary, and together with those of his two disciples, Abú Yusuf and Muhammad, are the chief, and, with a few exceptions, the only authorities which govern the Sunní law in India. Abú Hanífah's principal works are:—1—The Musnad (the support or pillar), in which are established all the essential points of Islámism on the authority of the *Kurán*, Sunnat, and Hadís; 2—Fulak-ul-ilm, or the orbit of science, a treatise on Scholastic theology, in which he exposes the various errors and contradictions of the Heterodox; 3—The Muallim, a short catechism showing the superior excellence and efficacy of faith; and 4—The Fikah-ul-ákbar which is a Digest of law.*

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its most common acceptation, 'mujtahid' signifies one who strives to accomplish a thing or to make a great effort; but, in speaking of law-doctors,

* Abú Hanífah is considered by the Muhammadans as the great oracle of jurisprudence, he being the first among them who attempted to argue abstractedly upon points of law, and to apply the reason of men to the investigation of temporal concerns. His early youth is said to have been marked by a strong predilection for study, an uncommon acuteness of understanding. His polemical abilities gained him the reverence and admiration of his disciples as may be collected from an anecdote which is recorded by Sháfií in the introduction to his Usúl, where he relates that, inquiring of Málik, 'whether he had ever seen Abú Hanífa?' he was answered by that doctor, "yes; and he is such a person, that if he were to assert a wooden pillar was made of gold, he would prove it to you by argument." Sháfií

The founder of the second sect was Abú Abd-ullah Málik Bin Anas,* whose tenets are principally respected

Máliki sect.

ANNOTATIONS.

it denotes one who brings into operation the whole capacity of forming a private judgment relative to a legal position.†

himself, although differing materially from him in his legal decisions, says in another part of the same work, that 'no study whatever could enable any man to rival Hanífah in the knowledge of the law.' It appears, indeed, from the best authorities, that he was a man eminently endowed with science, both speculative and practical. It is related that Ibnu Hubairah, the governor of Kúfah, importuned him to accept the office of Kází or judge, and upon his persisting in refusing it, caused him to be scourged for eleven days successively, with ten stripes a day until at length, being convinced of his inflexibility, he released him: and some years after, the Khalífah Abú Jáfir al-Mansúr, having invited him from Kúfah to Bagdad tried to prevail on him to accept the same office, which having declined as before, he was thrown into prison, and there he remained confined until he died in A. H. 150.

His principal scholars were Imám Abú Yusuf and Imám Muhammad, of whom we shall presently have occasion to speak more particularly. The sect of Hanífah at first prevailed chiefly in Irák; but his doctrines afterwards spread into Assyria, Africa and Transoxania: and his authority with respect to jurisprudence is at present generally received throughout Turkey, Tartary and Hindustán.—*Vide* Hidáyah, Prel. Disc., pp. xxiii—xxv.

* Imám Abú Abdullah Málik Bin Anas was born at Medina A. H. 94 (A. C. 716). Living in the same place with, and receiving his earliest impressions from, Sihl Ibnu Saad, the almost sole surviving companion of Muhammad, an ear witness of his precepts, and a participator in his dangers and exploits, Málik acquired the utmost veneration for the traditions, to which he paid an implicit regard through life. He was indeed considered as the most learned man of his time in that department of knowledge, and exerted his utmost endeavours to procure reverence and respect to those posthumous precepts of the Prophet. His self-denial and abstinence were remarkable, in so much that he generally fasted four days in the week, during which he denied himself even the most ordinary indulgencies. He enjoyed the advantages of a personal acquaintance and familiar intercourse with Abú Hanífah, although differing from him with respect to the absolute authority of the traditions. With regard to the traditions, his authority is generally quoted as decisive. In fact, he considered those as altogether superseding the judgment of man; and on his death-bed he severely condemned himself for the many decisions he had presumed to give on the mere suggestion of his own reason. The *Kurán* and the *Sunna* excepted, the only study to which he applied himself, in his latter days, was the contemplation of the Deity; and his mind was at length so much absorbed in the immensity of the Divine attributes and perfections, as to lose sight of all insignificant objects. Hence he gradually withdrew himself from the world, became indifferent to its concerns, and after some years of complete retirement, died at Medina, A. H. 179 (A. C. 801). His authority is at present chiefly received in Barbary, and the other Northern States of Africa. His principal scholars were Sháfií (who afterwards himself gave the name to a sect), Abú Layis, and the learned Ibnu Sarík.—*Vide* Hidáyah, Prel. Disc., page xxv.

† Amongst the Sunní sects, Mujtahids are classed under several divisions, according to the degree of Ijtihád which they may have attained. The

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in Barbary and the northern states of Africa: they are not known to prevail in any part of India. Of his works, the only one on record is the Muwatta, which contains a review of the most remarkable judgments of the Prophet.

Sháfií sect.

The founder of the third sect was Abú Abd-ullah Muhammad Bin Idrís ash-Sháfií. Having descended from Abd-ul-Muttalib, the son of Abd-ul-Munáf, the ancestor of Muhammad, Sháfií had the distinguished honor of being of the same race as the Prophet himself was. It is for this reason that he is known by the surname 'Al-Kureshí al-Muttalibí.' Shafií's doctrines have a limited range amongst the Musalmán inhabitants of the sea-coast of the Peninsula of India; but the chief seats of their authortiy are Egypt and Arabia. His doctrines are said to be of some repute also amongst the Malays and the Muhammadans of the Eastern Archipelego. His followers were at one time very numerous at Khurásán; but at present his doctrine is rarely followed there, or in India, except in some parts of Bombay. His first work was the Usúl or fundamentals, containing all the principles of the Musulmán civil and canon law; his next literary productions were 'The Sunnán and the Musnad' both of which treated of the traditional law, and which are in high estimation among the orthodox. His works upon practical divinity are various; and those upon theology consist of fourteen volumes.*

Mujtahids of the first class were very frequent in the three first centuries of the Hijrah; but in latter times the doctrines of the law becoming more fixed, the exercise of private judgment, to an unlimited extent, soon ceased to be recognised. As a title, the term 'Mujtahid' has long since fallen into disuse amongst the Sunnís.—Morl. Dig., Introd., p. ccxxxvii.

* Imám Muhammad Bin Idrís ash-Sháfií was born at Askalon in Palestine, A. H. 150 (A. C. 772). He was of the same stock with Muhammad,

Abú Abd-ullah Ahmad ash-Shaibání al-Marwárí, generally known by the name of 'Ibnu Hanbal,' was the founder of the fourth principal sect of the Sunnís. The followers of his doctrines, though at one time very numerous, are at present seldom met with, out of the confines of Arabia. He published only two works of note, one entitled the Masnad, which is said to contain above 30,000 traditions, selected from 750,000, and the other, a collection of apothegms or proverbs, containing

Hanbalí sect.

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and distinguished by the appellation of 'Imám al-Muttlibí, or Kurésh al-Muttlibí,' because of his descent from the Prophet's grandfather Abd-ul Muttalib. He derived his patronymick title, or surname, Sháfií, from his great grandfather, Sháfií Ibnu Suhib. Shafií is reported by the Musulmán writers, to be the most accurate of all the traditionists; and if their accounts be well founded, nature had indeed endowed him with extraordinary talents for excelling in that species of literature. It is said, that at seven years of age he had got the whole *Kurán* by rote: at ten, he had committed to memory the Muwatta of Málik; and at fifteen he obtained from the college of Mecca the degree of a Muftí, which gave him the privilege of passing decisions on the most difficult cases. He passed the earlier part of his life at Gaza in Palestine (which has occasioned many to think that he was born in that place), and there he completed his education and afterwards removed to Mecca, whence he came to Bagdad A. H. 195, where he gave lectures on the traditions. From Bagdad he went on a pilgrimage to Mecca, and thence afterwards passed into Egypt, where he met with Málik. It does not appear that he ever returned from that country, but spent the remainder of his life there, dividing his time between the exercises of religion, the instruction of the ignorant, and the composition of his latter works. He died at Cairo A. H. 204 (A., C. 826). Although he was forty-seven years of age before he began to publish, and died at fifty-four, his works are more voluminous than those of any other Mussalmán Doctor. His tomb is still to be seen at Cairo, where the famous Salah-ud-Dín afterwards (A. H. 587) founded a college for the preservation of his works and the propagation of his doctrines. The magnificent mosque and college at Herat in Khurásán were also founded for the same purpose, by the Sultán Ghiyás-ud-Dín, at the instance of the Sháfietes, who at one time were very numerous in the Northern Provinces of Persia. The sect is at present chiefly confined to Egypt and Arabia; and, however highly they may esteem his authority, his decisions in civil and criminal jurisprudence are seldom quoted by the Doctors of Persia or India. He studied jurisprudence under the learned Muslim Bin Khalíd, Head Muftí of Mecca, and accomplished himself in the knowledge of traditions from Málik in Egypt. His principal scholars were Hanbal and Zuharí, the former of whom afterwards gave his name to a sect. His reverence for God was such, as that he never was heard to mention His name except in prayer. His manners were mild and ingratiating, and he reprobated all unnecessary moroseness or severity in a teacher, it being a saying of his, that 'whoever advised his brother tenderly, and in private, did him a service; but that public reproof could only operate as a reproach.'—*Vide* Hidáyah, Prel. Disc., p. xxvii.

LECTURE I.

many admirable precepts upon the government of passion.*

These are the four principal Sunní sects or classes which are called after their founders, Abú Hanífah, Málik Bin Aanas, Sháfií, and Ibnu Hanbal.†

Abú Abd-ullah Sufiyán as-Saurí and Abú Dáúd Sulaimán az-Záhirí are said to have been the founders of two other Sunní sects; they, however, had but few followers; a seventh sect is said to have for its chief the celebrated historian At-Tabrí, but this also did not long survive (*a*).—*Vide* Morl. Dig., Introd., ccxxx.

ANNOTATION.

(*a*). The different sects or classes of the Sunnís, as above stated, do not differ in the Usúl or fundamentals of Muhammadanism, nor in the interpretation and exposition of the *Kurán* (except very slightly in a few parts thereof), but in what they differ materially from one another are the admission or rejection of particular traditions, *Ijmaa*, the full, the less, or no, exercise of the *Kiyás*, and the drawing of legal conclusions.

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* This learned Imám was born at Bagdad A. H. 164 (A. C 780), and died A. H. 241 (A. D. 855). He was a pupil of Sháfií. He strenuously upheld the opinion that the *Kurán* was uncreated, and that it had existed from all eternity. Since, however, it happened unfortunately that the Khalífah Al-Mutásim maintained the contrary doctrine, Ibnu Hanbal was greatly persecuted for his persistent opposition to that monarch's favorite belief. It is related in history that no fewer than 8,00,000 men and 60,000 women were present at this Doctor's funeral, and that 20,000 Christians, Jews, and Magians became Muhammadans on the day of his death. Whatever degree of credit may be attached to this extraordinary statement, its mere existence sufficiently attests the astonishing reputation which Ibnu Hanbal had acquired during his life-time, and the veneration in which he was held after his death. Persecution, however, soon thinned the ranks of his followers; and though at one time they were very numerous, the Hanbalís are now seldom to be met with out of the confines of Arabia.—*Vide* Morl. Dig., Vol., I, Introd., p. ccxxviii.

† Of these four chief sects of the Sunnís, the followers of Málik and Ibnu Hanbal may be considered, as the most rigid; whilst those of Sháfií may be characterized as holding doctrines most conformable to the spirit of *Islam*, and the sectaries of Abú Hanífah as maintaining the mildest and most philosophical tenets of all.—*Ibid.*, p. ccxxxiii.

Though the Sunnís are said to be governed by the authority of the *Ijmaa* as well as by that of the *Kurán* and *Hadís* including *Sunnat*, and more or less by the authority of *Kiyás* (ratiocination), yet there are bodies of people who do not submit to the authority of the *Kiyás*, and to that of the *Ijmaa*, unless it be of the Sahábah or companions of the Prophet. These people are denominated 'Muhaddasín' (traditionists), and are commonly called Wahhábís after the name of Abd-ul-Wahháb the founder of their sect who lived in the eighteenth century. They reside in Najd or central Arabia, also in southern Arabia, and have their own rulers,* whose mandates are decisive in any matter of law when no rule or decision on that point is to be found in the *Kurán* or in the Hadís. There are Wahhábís also in Sitana and in some parts of India, though in the latter they live generally in disguise. The Wahhábí sect must be said to have been derived from the Sunní sect, inasmuch as Abdul Wahháb and the people of Najd were originally Sunnís, and their doctrines differ only in a few respects from those of the Sunnís.

Wahhábís.

The founders of the four principal sects of the Sunnís being, as already stated, of different opinions, and broach-

* The first ruler of the Wahhábís was Saúd, the second, a disciple and patron of the great Wahháb, and was himself converted to the Wahhábí sect. He was succeeded by his eldest son Abd-ul-Azíz, who was assassined by a fanatic of the Province of Ghílán about 1805 or 1806, and was succeeded by his younger brother Abd-ullah. This ruler was defeated and taken a prisoner to Egypt by Ibrahím Báshah or Páshah, the predecessor of Ismáil Páshah, and thence he was summoned to Constantinople, and there put to death on his first arrival. His brothers and kinsmen, with the survivors of the old Wahhábí family, and many other chiefs of note, were by order of the Sultán close prisoned in Egypt. Turkí, the son of Abdullah, who had made his escape, eventually re-appeared at Riad, and took possession of the kingdom which he continued to hold without molestation from Egypt or elsewhere, until he was assassined by his cousin Mashárí. Turkí is succeeded by his son Faizal, and Faizal by his eldest son Abdullah who is the present ruler of the Wahhábís in Central Arabia.

LECTURE I.

ing, in many respects, separate doctrines, based upon different traditions, or sometimes upon the same traditions differently interpreted, and upon the greater or less exercise of the *Kiyás*, Digests of law have been written by a host of learned lawyers, some expounding especially and exclusively the doctrines of a particular sect, and others giving in one and the same work expositions of the doctrines of the different founders and followers of all those sects.

Digests of law.

The chief works of this nature that treat generally of the doctrines of the four principal sects of the Sunnís are mentioned by Hájí Khalífah to be the Jámi-ul-Mazáhib, the Majmaa-ul-Khiláfiyát, the Yanábiya-al-Ahkám, the Uyúm, and the Zubdat-ul-Ahkám.*

The Kanz-ud-Dakáïk, by An-Nasafí, is a book of great reputation, principally derived from the Wáfí; and containing questions and decisions according to the doctrines of Abú Hanífáh, Abú Yusuf, Imám Muhammad, Zufar, Sháfií, Málik, and others.

Many commentaries have been written on the last mentioned work: the most famous of them is the Báhr-ur-Ráïk, which may, indeed, almost be said to have superseded its original, at least in India. The Bahr-ur-Ráïk is by Zain-ul-Aabidín Bin Nujaim-ul-Misrí (*a*).

ANNOTATION.

(*a*). This author died A. H. 970 (A. C. 1562). Premature death compelled him to leave his work incomplete which was finished

* "The only one of these works," says Mr. Morley, "of which I have been able to find a particular description, is the Zubdat-ul-Ahkám, which expounds the practical statutes of the different doctrines of the four Sunní sects, and was written by Siráj-ud-Dín Abú Hafs Umar-ul-Ghaznaví, who was a follower of Abú Hanífah, and died A. H. 773 (A. C. 1371).

The Multaka-al-Abhár by Shaikh Ibráhím Bin Muhammad al-Halabí, who died A. H. 956 (A. C. 1549), is a universal code of Muhammadan law. It gives the different opinions or doctrines of Abú Hanífáh, Málik, Sháfií and Hanbal, the chief Mujtahid Imáms and the founders of the four great sects of Sunnís, and illustrates them by those of the principal jurisconsults of the school of Abú Hanífáh. It is more frequently referred to as an authority throughout Turkey, than any other treatise on jurisprudence.— *Vide* Morl. Dig. Introd., cclxxii.

The Digests inculcating exclusively the doctrines of each of the said four great sects are indeed numerous, though a very few of them which maintain the doctrines of the Málikí, Sháfií or Hanbalí sects are used in India.

Digests written by Málik or any of his followers are scarcely found in this country. Of the Digests maintaining the Málikí doctrines, two, I learn, have lately appeared in France.*

ANNOTATIONS.

by his brother Siráj-ud-Dín Umar, he also wrote another commentary on the same work, entitled the 'Nahr-ul-Fáïk.' There is another commentary on the Kanz-ud-Dakáïk entitled the Tabyín-ul-Hakáïk, which was composed by Fakhr-ud-Dín Abú Muhammad Bin Alí az-Zailaí, who died in A. H. 743 (A. D. 1342). Of the other commentaries on the Kanz-ud-Dakáïk, two deserve notice, one entitled the Ramz-ul-Hakáïk by Badr-ud-Dín Mahmúd Bin Ahmad al-Ainí, who died in A. H. 855 (A. C. 1451); the other is the Matlab-ul-Fáïk by Badr-ud-Dín Muhammad Bin Abd-ur-Rahmán ad-Dairí; the former is much esteemed in India.— *Vide* Morl. Dig. Introd., p. cclxx.

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* "The first of these," says Mr. Morley, "was published in 1842, by M. Vincent. It contains a short account of the origin of the Málikí doctrine principally derived from Al-Makrází, a description of the most noted

LECTURE I.

The first work of Sháfií entitled the 'Usúl' or fundamentals, which contains the principles of the Muhammadan civil and canon law, may be classed as a Digest. The Mukhtasar, the Mansúr, the Rasáïl ul-Muatabirah and the Kitáb-ul-Wasáïk are amongst the other works written by Abú Ibrahím Ismáíl Bin Yahiyá al-Muzaní, a distinguished disciple of Sháfií and a native of Egypt, and are according to the doctrines of Sháfií.*

The works by Ibnu Hambal and his followers are few in number, and rare in India.

The followers of the Haníffí sect which obtains most commonly amongst the Muhammadans of India, and, therefore, claims our particular attention, have, like others, divided their law into two general branches or parts—respectively called the 'Fikah (law, religious and secular)'

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works treating of that doctrine, and a translation of the chapter on Criminal Law, taken from the Risálah of Abú Muhammad Abd-ullah Bin Abú Zayid al-Kairuwání. The preliminary matter in M. Vincent's treatise is very interesting."

"The second, which is a French translation by M. Perron, of the Muktasar of Khalíl Ibú Ishák, is now in progress: two volumes have already appeared, and were published, respectively, in the years 1848 and 1849. The Mukhtasar is a work professedly treating of the law according to the Málikí doctrines. M. Perron's version has been undertaken by order of the French Government, for the special use of those who are employed in the administration of justice in Algeria, and is the more valuable, as the translator has not confined himself to a bare translation of the original text, but, has illustrated all the obscure passages by introducing explanations from the different commentators on the work."

The work has since been completed, and presents one of the complete translations of a general treatise on Muhammadan jurisprudence. The typographical excellence of the volumes, combined with their lowness of price, do honour to the liberality of the French Government.

* The Mukhtasar is the basis of all the treatises composed on the legal doctrines of Sháfií, who himself entitled Al-Muzaní, "the champion of his doctrine." Al-Muzaní died in A. H. 264 (A. C. 877). Morl. Dig., Introd. p. cclxxv.

and 'Faráïz,* (the succession to, and division of, Inheritance).'

The works which are on Fikah and which are known or considered in this country as the chief authorities of the Hanífí sect, are the following:—

Abú Hanífáh's own Digest of law entitled the 'Fikah-ul-Akbar.' This is the first in rank, and has been commented upon by various writers, many of whom are mentioned by Hájí Khalífah. The doctrines of that great lawyer, however, are sometimes qualified or dissented from† by the two of his famous pupils Abú-Yusuf‡ and Imám Muhammad.§

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* Because they allege Faráïz to be half of the legal science, in accordance with their Prophet's saying that 'The Law of Inheritance is one half of (useful) knowledge;' and the reason given for his so saying is, that it has relation to death, while the other sciences have to life.

† Sir William Jones says,—"Although Abú Hanífah be the acknowledged head of the prevailing sect, and has given his name to it, yet so great veneration is shown to Abú Yusuf, and the lawyer Muhammad, that when they both dissent from their master, the Mussalmán judge is at liberty to adopt either of the two decisions which may seem to him the more consonant to reason, and founded on the better authority."

"In former times," says Mr. Morley, "it seems that Abú Hanífah's opinion was preferred, even when both the disciples dissented from him: but this is not the case at the present day. There is also a distinction of authority to be observed, *viz.*, that where the two disciples differ from their master and from each other, the authority of Abú Yusuf, particularly in judicial matters, is to be preferred to that of Muhammad. In the event, however, of one disciple agreeing with Abú Hanífah, there can be no hesitation in adopting that opinion which is consonant with his doctrine." Morl. Dig., Introd. pp. cclxii & cclxiii.

‡ Abú Yusuf Yákúb Bin Ibráhím al-Kúfí was born A. H. 113 (A. C. 731), and died at Baghdád. A. H. 182 (A. C. 798). He was a pupil of Abú Hanífah, and was first appointed to the office of Kází of Baghdád by the Khalífah al-Hádí Subsequently he was raised to the dignity of Kází-ul-Kuzzát, or chief civil magistrate, by the Khalífah Hárún ur-Rashíd, being the first who held that high office.—*Vide Ibid.*, p. cclxiii.

§ The full name or appellation of this Doctor is "Abú Abd-ullah Muhammad Bin Hussain ash-Shaibání." He was born at Wásitah in Irák-ul-Arab A. H. 132 (A. C 749), and died at Ray, the capital of Khurásán, A. H. 187 (A. C. 802). Imám Muhammad, as he is most generally called, was a fellow pupil of Abú Yusuf under Abú Hanífah, but on the death of the latter he pursued his studies under the former.

It is also stated, that, in his younger days, he was instructed by Imám Málik.—*Vide Ibid*, p. cclxiii.

LECTURE I.

The work entitled Adab-ul-Kází, which treats of the duties of a magistrate, is known to have been written by Abú Yusuf. Save and except this, no other work appears to have been composed by him. He, however, is said to have supplied his notes to his pupil, Imám Muhammad, who made use of them in the composition of his own works.

The works of Imám Muhammad, much known in India, are six in number, five of which are, in common, entitled the Záhir-ur-Rawáyát (conspicuous traditions or reports). They are: 1—The Jámi-ul-Kabír, 2—Jámi-us-Saghír, 3—Mabsút fí Farú-ul-Hanífiyát, 4—Ziyádát fí Farú-ul-Hanífiyát, and 5—Siyar al-Kabír wa Saghír *(a)*.

The Nawádir, the sixth and last of the known compositions of Imám Muhammad, though not so highly esteemed as the others, is still greatly respected as an authority.

The next authorities among the Hanafís of India, after the founder of their sect and his two disciples, are the

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ANNOTATION.

(*a*). Of the above-mentioned books, the first is commented upon by several learned lawyers;* the second, by Sarakhsí, Burhán-ud-Dín Alí, the author of the Hidáyah, and many other Doctors; the third also is commented upon by several Doctors and is greatly celebrated as the two former are; the fourth is said to have been composed under the inspection, and with the approbation of Abú Yusuf, and together with its supplement by the same author, has been commented upon by a multitude of writers, amongst whom are As-Sarakhsí, and Kází Khán Hasan Bin Mansúr al-Úzjandí.—Morl. Dig. Introd. p. cclxiv.

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* Amongst whom are the well-known Shams-ul-Aïmmah Abú Bakr Muhammad as-Sarakhsí, who died A. H. 490 (A. C. 1096), and Burhán-ud-Dín Mahmúd Bin Ahmad, each of whom composed a work entitled "al-Muhít," which will be presently noticed.—*Vide* Morl. Introd. p. cclxiv.

Imám Zufar Bin al-Hazíl, who was chief judge at Basrah, where he died A. H. 158 (A. C. 774), and Hasan Bin Ziyád. These lawyers are said to have been contemporaries, friends, and scholars of Abú Hanífáh, and their works are quoted here as authorities for Abú Hanífáh's doctrines, more especially, when the two disciples are silent. LECTURE I.

The most celebrated of the several treatises known by the name of Adáb-ul-Kází was written by Abú Bakr Ahmad Bin Umar al-Khassáf.*

An abridgment of the Hanafí doctrines, called the 'Mukhtasar ut-Tahaví' was written by Abú Jaafar Ahmad Bin Muhammad at-Tahaví who wrote also a commentary on the Jámi us-Saghír of Imám Muhammad. Both these works have been often quoted as authorities in India. They, however, are not known to exist in this country at the present day. At-Tahaví died A. H. 321 (A. C. 933.)

The Mukhtasar lil-Kudúrí by Abú ul-Husain Ahmad Bin Muhammad al-Kudúrí is among the most esteemed of the works which follow the doctrines of Abú Hanífah, and of high authority in India.† Kadúrí.

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* He died A. H. 261 (A. C. 874). Hájí Khalífah speaks very highly of this work, which contains one hundred and twenty chapters, and has been commented upon by many learned jurists: the most esteemed commentary is that by Umar Bin Abd-ul-Aziz Bin Mázeh, commonly called Husám ash-Shahíd, who was killed A. H. 536 (A. C. 1141.)—Morl. Introd., p. cclxv.

† Indeed, it is in such general repute, that Hájí Khalífah, when speaking of those several works which are emphatically designated by Antonomasia, "Al-Kitáb" or "the book," says, that if, in matters connected with jurisprudence, such expression be used, it signifies the Mukhtasar lil-Kúdurí. It is a general treatise on law, and contains upwards of twelve thousand cases. As may be supposed with regard to a work of such celebrity, it has been commented on by numerous writers: several of these commentaries are quoted in the Fatáwá al-Aálamgírí. Al-Kudúrí died A. H. 228 (A. C. 1036).—Morl. Dig. Introd., p. cclxv.

LECTURE I.

There is a well-known Commentary on the Mukhtasar lil-Kudúrí entitled 'Al-Jauharat un-Nayyirah,' which is sometimes called Al-Jauharat ul-Munírah.*

The Digest entitled the 'Mabsút' was composed by Shams-ul-Aïmmah Abú Bakr Muhammad as-Sarkhsí (mentioned above as the author of the comments upon the Jámi al-Kabír and the Jámi us-Saghír of Imám Muhammad), whilst in prison at Úzjand. This is a work of great extent and authority. He was also the author of the most celebrated work entitled 'Al-Muhít,' which is derived in a great measure from the Mabsút, the Ziyádát, and the Nawádir of Imám Muhammad.

The work entitled 'the Muhít' by Burhán-ud-Dín Mahmúd Bin Ahmad, already spoken of, is not so greatly esteemed as the Muhít-us-Sarakhsí.†

A compendium of Al-Kúdurí's Mukhtasar, which he entitled 'the Tuhfat-ul-Fukahá,' was composed by Shaikh Alá-ud-Dín Muhammad as-Samarkandí. The work of Alá-ud-Dín was commented upon by his pupil Abú Bakr Bin Masuúd.

Hidáyah.

There are several Arabic works on philosophical and theological subjects which bear the name of 'Al-Hidáyah' (the guide). The work entitled 'Al-Hidáyah fí-al-farú'‡,

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* Mr. Baillie says, that this work, though of later date than the Hidáyah, is perhaps more valuable in other respects.

† The work of Burhán-ud-Dín Mahmúd is commonly known as the Muhít al-Burhání, and is taken principally from the Mabsút, the two Jámias, the Siyar, and the Ziyádát of Imám Muhammad; the author also made use of the Nawádir of the same doctor in composing his work.—Morl. Dig. Introd., p. cclxvi.

‡ '*Farú*' literally means, 'branches,' and is here opposed to Usúl, signifying the roots, *i. e.*, the fundamental principles.

or the guide in particular points, is a Digest of law according to the doctrines of Abú Hanífah and his disciples Abú Yusuf and Imám Muhammad. The author of this work is Shaikh Burhán-ud-Dín Alí,* whose reputation, as a lawyer, was beyond that of all his contemporaries. This Hidáyah is a commentary on the Badáya-al-Mubtadá, an introduction to the study of law, written by the same author in a style exceedingly concise and close. In praise of the Hidáyah, Hají Khalífah says, "It has been declared, like the *Kurán*, to have superseded all previous books on the law; that all persons should remember the rules prescribed in it; and that it should be followed as a guide through life" *(a)*.†

ANNOTATIONS.

(*a*). The Hidáyah partakes of the nature of a digest as well as of a commentary: the author, commenting upon each text of the original, has expounded the law on the particular point by citing authorities from the most approved works of the early writers on jurisprudence. The work possesses the singular advantage of combining, with the authorities, the different opinions and explications of the principal commentators and expositors on all disputed points, together with the reason for preferring any one adjudication in particular, by which means the principles of the law are fully disclosed; and we have not only the principles but also the most ample explanations thereof. In his commentaries the author generally leans to the doctrine of Abú Hanífah, or his principal disciples. And, indeed, his work may, in a great measure, be considered as an abstract of the Hanífí opinions, modified by those of

* Shaikh Burhán-ud-Dín Alí Bin Abú Bakr al-Marghínání was born at Marghínán, a city of Maveralner, (the ancient Transoxania) about A. H. 530 (A. C. 1152). He wrote several works on jurisprudence all of which are considered high authorities, more especially the Hidáyah, which he wrote in thirteen years, after which he died A. H. 593 (A. C. 1196).

† The text of the Hidáyah was published in the original Arabic at Calcutta A. H. 1234 (A. C. 1818), and was again edited together with the Kifáyah one of its commentaries by Hakím Moulaví Abd-ul Majíd in 1834. The Persian version of the Hidáyah was also published in Calcutta in the year 1807.

LECTURE I.

The Hidáyah has, besides the Kifáyah, many other commentaries, as a work of so great celebrity and authority is expected to have. The principal ones are the Ináyah the Nihâyah, and Fath-ul-Kabír. The name Ináyah, however, is given to two commentaries on the Hidáyah. Of these, the one composed by Shaikh Kamál-ud-Dín Muhammad Bin Mahmúd, who died A. H. 786. (A. C. 1384) is highly esteemed and useful. Supplying by way of innuendoes what was omitted or left to implication, also expressing what was understood in the Hidáyah, and explaining the words and expounding the passages of the original by the insertion of explanatory phrases, the author of the Ináyah has rendered the work such as to be considered of itself one of his own principal works, with citations of passages from the Hidáyah.*

ANNOTATIONS.

the more recent teachers, and adapted to the practice and manners of other countries and works of later times.

With respect to the citation of authorities and preference given to any of them, by the author of the Hidáyah, Hají Khalífah remarks: "It is a practice observed by the composer of this work to state, first, the opinions and arguments of the two disciples (Abú Yusuf, and Imám Muhammad); afterwards the doctrine of the great Imám (Abú Hanífah); and then to expatiate on the proofs adduced by the latter, in such a manner as to refute any opposite reasoning on the part of the disciples. Whenever he deviates from this rule, it may be inferred that he inclines to the opinions of Abú Yusuf and Imám Muhammad.† It is also his practice to illustrate the cases specified in the Jámi-us-Saghír and Kadúrí; intending the latter, however, he uses the expression 'he has said in the book.'"

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* The Arabic text of the Ináyah, edited by Babú Rámdhan Sen, was published in Calcutta in 1837.

† Or either of them; and, generally, it is his practice to cite that authority or authorities last, whose doctrine he adopts.

The Nihâyah is composed by Husâm-ud-Dín Husain Bin Alí, who is said to have been a pupil of Burhán-ud-Dín Alí. This is said to be the first commentary composed on the Hidâyah; and it is important for having added the Law of Inheritance to the Hidâyah which treats only of the Fikah.

The commentary, entitled the Kifâyah, is by Imâm-ud-Dín Amír Kâtib Bin Amír Umar, who had previously written another explanatory gloss of the same work, and entitled it 'the Ghâyat-ul-Bayán.' The Kifâyah was finished A. H. 747 (A. C. 1346), and, besides the author's own observations, it gives concisely the substance of other commentaries.

The Fath-ul-Kadír lil-Aájiz ul-Fakír by Kamal ud-Dín Muhammad as-Siwásí, commonly called Ibnu Hammám, who died A. H. 861 (A. C. 1456), is the most comprehensive of all the comments on the Hidâyah, and includes a collection of decisions which render it extremely useful.

The short commentary entitled the 'Fawâid' written by Hamíd-ud-Dín Alí Al-Bukhárí, who died A. H. 667, (A. C. 1268), is said to be the first of all the commentaries on the Hidâyah.

The Wáfí by Abú-ul-Barakât Abd-ullah Bin Ahmad, commonly called Háfiz-ud-Dín an-Nasafí, and its commentary, the Káfí, by the same author, are works of authority. An-Nasafí died A. H. 710 (A. C. 1310).

The Vikâyah, which was written in the seventh century of the Hijrah by Burhán ash-Shariyat Mahmúd, is an elementary work to enable the student to study and understand the Hidâyah. The Vikâyah is printed, and invari-

LECTURE I.

ably studied with its celebrated commentary the 'Shah-ul-Vikáyah,' written by Ubaidullah Bin Masuúd, who died A. H. 745 (A. C. 1344).

Sharh-ul-Vikáyah.

The Sharh-ul-Vikáyah contains the text of the Vikáyah with a gloss most perspicuously explanatory and illustrative, so much so, that those chapters of it which treat of marriage, dower, and divorce, are studied in the Madrassah of this city in preference to the Hidáyah itself. There are also other commentaries on the Vikáyah, but not so useful as the above.

On the Sharah-ul-Vikáyah again there is an excellent commentary entitled the Chalpí, written by Akhí Yusuf Bin Juníd, who was one of the then eight professors at Constantinople. This work was commenced to be written about the year 891 and completed in 901 Hijree, and the whole of it was published here in Calcutta A. H. 1245, and extracts therefrom have been printed here in the Hijree year 1272. The book so printed is more frequently used here than the Sharah-ul-Vikáyah alone.

The Nikáyah is another elementary law book well known in India, and is the work of the author of the Sharah-ul-Vikáyah. It is sometimes called the Mukhtasar-ul-Vikáyah, being in fact, an abridgment of that work.

Three Comments on the Nikáyah are much esteemed; they were written respectively by Abú ul-Makárim Bin Abd-ullah A. H. 907 (A. C. 1501), Abú Alí Bin Muhammad al-Birjindí A. H. 935 (A. C. 1528), and Shams-ud-Dín Muhammad al-Khurásání Al-Kohistaní A. H. 941 (A. C. 1534). The last commentary is entitled the Jámi-ur-Rumúz, which is the fullest and the clearest

of the lot, as well as one of the most useful law books frequently referred to in this country. This work was for several years adopted for study in the first and second classes of the Calcutta Madrassah.

The Ashbah wa an-Nazáïr is also an elementary work of great reputation. It was composed by Zain-al-Aábidín, the author of the Bahr-ur-Ráïk already mentioned.* Hájí Khalífah speaks of this work in high terms, and enumerates several Appendices to it that have been composed at different times.†

The law treatise entitled 'the Núr-ul-Anwár fí Sharah-ul-Manár,' by Shaikh Jún Bin Abú Sayyid Al-Makkí, was printed here 1819, and is frequently referred to as a book of authority.

A small tract on the sources of the *Sharaa*, entitled the 'Usúl-ush-Sháshí,' together with an explanatory commentary, was printed in lithography, at Delhi, in the year 1847.

The Tanvír-ul-Absár composed by Shaikh Shams-ud-Dín Muhammad Bin Abd-ullah al-Ghazzí A. H. 995 (A. C. 1586) is one of the most celebrated and useful books according to the Haníffí doctrines. This work has many commentaries. One of them entitled the 'Manh-ul-Ghaffár,' which is written by the author himself, is a work of considerable extent.

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* See *ante*, page 34.

† The original text of the Ashbah wa an-Nazáïr was published at Calcutta in the year 1826, edited by Bábú Rámdhan Sen; and was again printed here together with a commentary by Ahmad Bin Muhammad al-Hamaví in 1844.

LECTURE I.

Durr-ul-Mukhtár.

The Durr-ul-Mukhtár, which is another commentary on the Tanvír-ul-Absár, is a work of great celebrity. This work was written A. H. 1071 (A. C. 1660) by Muhammad Alá-ud-Dín Bin Shaikh Alí al-Hiskafí. Though a commentary, it is virtually a Digest, which of itself has several commentaries, the most celebrated of them is 'the Tahtáví,' a work used in this country. Another commentary on the Durr-ul-Mukhtár is the Radd-ul-Muhtár.* This is a very copious work, comprising an immense number of cases and decisions illustrative of the principles contained in the principal work. The Durr-ul-Mukhtár treats not only of the Fikah but also of the Faráïz. It is used by the followers of the Haníffí doctrines wherever they are; but it is most highly esteemed in Arabia where it is studied and referred to in preference to other books of law. Knowing the Durr-ul-Mukhtár to be the chief guide of Arabia, and a very high authority among the Haníffís, I have constantly cited the work as an authority, and quoted its passages in several parts of these lectures, more especially in the part treating of Inheritance.

These are the principal Digests of law that are known, and are of authority among the Sunnís of the Haníffí sect in India; but as may be imagined, are only those that are principally and generally quoted in the Courts.

Many works, I learn, have been written according to the doctrines of Abú Hanífah in the Turkish Empire, and are received there as authorities. The most celebrated of

* The Radd-ul-Muhtár is composed by Muhammad Amín, known by the name of Ibnu Abidín, and printed in Egypt A. H. 1286, in five volumes of 4to size. This great work is occasionally referred to in this country.

those is the Multaka-ul-Abhár by Shaikh Ibrahím Bin Muhammad al-Halabí, the Durr-ul-Hukkám by Mullah Khusrú, Kánún-námai-Jazá, a tract on penal laws, &c.

"These, I apprehend," says Mr. Morley, "would be admissible if quoted in our Courts in India where the parties to a suit are of the Haníffí persuasion." See Morl. Dig. Introd., p. cclxxii.

The works which treat especially of the 'Ilm-ul-Faráïz', or science of dividing inheritances, are not numerous, at least in India.

Law of Inheritance.

Abú Saád Zayid Bin Sábit, one of Muhammad's ansár* and allies, who died in Medina A. H. 54 (A. C. 673), is the earliest authority on the Law of Inheritance (*a*).

A short treatise, entitled "The Bighyat-ul-Báhis, consisting of memorial verses, which gave an epitome of the Law of Inheritance according to the doctrine† of Zayid

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ANNOTATION.

(*a*). Muhammad is reported to have said to his followers, "The most learned among you in the laws of heritage is 'Zayid;" and the Khalífahs Umar and Othmán considered him without an equal as a judge, a juris-consult; a calculator in the division of inheritances, and a reader of the *Kurán*.—Morl. Dig., Introd., p. cclxxx.

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* The term 'ansár' is the plural of the word 'násir,' which signifies a person who became a follower of Muhammad when he retired to Medina, leaving Mecca; while he who was a follower of Muhammad in Mecca and went with him to Medina forsaking Mecca, is designated a 'Mahjar.'

† This doctrine, which was partly exploded by Abú Haníffah, is still looked upon with respect by all the writers on 'Faráïz.' It cannot, however, be said, so far as we know, to belong to any particular sect, unless, indeed, it be that of Sháfií, who, it seems, took Zayid-Bin-Sábit for his chief guide. For this reason I place the Bighyat-ul-Báhis as the first in order of these separate works on the Ilm-ul-faráïz, although I have not been able to ascertain the period when its author flourished.—Morley. Introd., p. cclxxxi.

LECTURE I.

Bin Sábit, was next written by Imám Muwafik-ud-Dín Abí-Abdullah Muhammad Bin Alí Ar-Rahabí, surnamed Ibnu-ul-Mutakaunah.

The Treatises on the Laws of Inheritance according to the doctrine of Sháfií are 'the Faráïz-ul-Mutawallí' by Abú Sayíd Abd-ur-Rahmán Bin Mamún-ul-Mutawallí (who died A. H. 478 (A. C. 1085), 'the Faráïz-ul-Mukuddasí' by Abú-ul-Fazl, Abd-ul-Malik Bin Ibráhím al-Hamadání, Al-Mukuddasí, and Abú Munsúr Abd-ul-Káhir Al-Baghdádí (who died respectively A. H. 489 and 429 or A. C. 1095 and 1037); 'al-Faráïz-ul-fazárí' by Burhán-ud-Dín Abú Ishák Al-Fazárí, commonly called Ibnu Firkáh (who died in A. H. 729 or A. C. 1328), and 'Al-faráïz-ul-Fárikiyah' by Shams-ud-Dín-Muhammad Bin Killáyí (who died A. H. 777 or A. C. 1375).

Of the books on the Law of Inheritance according to the Haníff doctrines, the most celebrated and the one in-

Sirájiyyah. variably consulted in India is the Sirájiyyah, which is also called the Faráïz-us-Sajáwandí, being, as it is, composed by Siráj-ud-Dín Muhammad Bin Abd-ur-Rashíd as-Sajáwandí. This work has been commented upon by a vast number of writers, upwards of 40 being enumerated in the Kashf-uz-Zunún by Hájí Khalífah. The most celebrated

Sharífiyyah. of these commentaries and the one most generally used to explain the Text of the Sirájiyyah is the Sharífiyyah* by Sayyid Sharíf Alí Bin Muhammad Al-Jurjání, who died A. H. 814 or A. C. 1411.

* The original text of the Sirájiyyah, together with the Sharífiyyah, has been several times printed here in Calcutta.

The Sirájiyyah, which of itself is the highest authority* relating to the Law of heritage, (at all events, in India), forms together with the Sharífiyyah, the standard work on Abú Hanífáh's system of Inheritance.

The Chapter on Inheritance contained in the Durr-ul-Mukhtár is considered by some to be the next in authority to the Sirájiyyah, while others are of opinion, that the Fatáwá Sirájiyyah and the Fatáwá Alamgírí, as far as they treat of the Faráïz, are (in India) second in authority to the Sirájiyyah.

The Treatise on the Law of Inheritance, entitled the Faráïz-ul-Usmání, which was written by Burhán-ud-Dín Al-Marghínání, the author of the Hidáyah, though illustrated by several comments, is not much known here in India.

The Faráïz-i Irtiziah, a concise Treatise in Persian on the Law of Inheritance, appears to be much consulted in Dakhin: its author is Irtizá Alí Khán Bahádur.†

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* The Sirájiyyah is the highest authority amongst the Sunnís in India, Morl. Dig., Introd., p. cclxxxv.

With respect to the Sirájiyyah and the Sharáfiyyah, as well as their authors, Sir William Jones says:—"The two Mussalmán authors, whom I now introduce to my countrymen in India, are Shaikh Siráj-ud-Dín, a native of Sajáwand, and Sayyid Sharíf (who was born at Furján in Khwárazm near the mouth of the Oxus, and is said to have died at the age of 76 years, in the city of Shíráz): their compositions (meaning of the Shirájyyah and Sharífiyyah) have equal authority in all the Muhammadan Courts, which follow the system of Abú Hanífah with those of Littleton and Coke in the Courts of Westminster."—*Vide* Sirájiyyah, Pref., p. 1.

Again, alluding to his translation of the said two works, the learned translator asserts: "I am strongly disposed to believe, that no possible question could occur on the Muhammadan Law of Succession which might not be rapidly and correctly answered by the help of this work."—*Ibid*, p. vii.

† The Farázī-i-Irtizíah was printed at Madras without a date. I have never been able to meet with a copy of this work.

LECTURE I.

There is another kind of Digests which treat of the Ilm-ul-Fatáwá (the science of decisions). The works of this nature are also very numerous, and are, for the most part, called 'Fatáwá (decisions)' with the names of their authors; and though called 'Fatáwá,' most of them contain also the rules of law, as well as legal decisions. Of those again, some treat of the Fikáh alone, others of the Faráïz (inheritance) also; some of them, moreover, treat of the decisions of particular lawyers, or those found in particular books; others treat of those which tend to illustrate the doctrines of the several sects; whilst the rest of them are devoted to recording the opinions of learned jurists.

Fatáwá.

There are several collections of decisions, according to the doctrines of Sháfií. The one most esteemed seems to be 'Fatáwá Ibn us-Saláh' by Abú Amrú-Usmán Bin Abd-ur-Rahmán ash-Sháhrazúrí, commonly called Ibn us-Saláh who died in A. H. 642 (A. C. 1244). Ibnu Firkáh, the author of the Faráïz ul-Fazárí (a treatise on inheritance) also made a collection of decisions according to the same doctrines, which is called, after his name, the 'Fatáwá-i Ibnu Firkáh.'

Of the Fatáwás of the Haníff doctrines, the following are generally known in India.

The Khulásat-ul-Fatáwá by Imám Iftikhár-ud-Dín Táhir Bin Ahmad Al-Bukhárí, who died in A. H. 542 (A. C. 1147), is a select collection of decisions of great authority.*

* Iftikhár-ud-Dín was the author of the 'Khizánat-ul-Wákiyát,' and the 'Kitab-un-Nisáb,' on which books the Khulásat was grounded, and to which many subsequent collections of decisions are indebted for numerous valuable cases.—Morl. Dig., Introd., p. cclxxxv.

The Zakhírat-ul-Fatáwá sometimes called the 'Zakhírat-ul-Burháníyah,' by Burhán-ud-Dín Bin Mázah al-Bukhárí, the author of the Muhít-ul-Burhání, is also a celebrated, though not a large, collection of decisions, principally taken from the Muhít.

Fatáwá-i Kází Khán

The Fatáwá-i Kází Khán, by Imám Fakhr-ud-Dín Hasan Bin Mansúr al-Úzjandí al-Farghání, commonly called 'Kází Khán,' who died A. H. 592 (A. C. 1195), is a work held in India as a very high authority. It is replete with cases of common occurrence, and is, therefore, of great practical utility, more especially as many of the decisions are illustrated by proofs and reasoning on which they are founded.*

The two works entitled 'the Fasúl-ul-Isturúshí† and Fasúl-ul-Imádíah'‡ were incorporated in a collection entitled the Jami-ul-Fasúlain which is a work of some celebrity. It was compiled by Badr-ud-Dín Muhammad known by the name of Ibn-ul-Kází Simáwanah.§

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* Kází Khán was contemporary with Burhán-ud-Dín, the author of the Hidáyah. Yusuf Bin Junaid generally known by the name of "Akhí Chalabí at-Túkátí, epitomised Kází Khán's work and compressed it into one volume. The Fatáwá Kází Khán was lithographed in Calcutta and edited by Moulaví Muhammad Murád, Moulaví Háfiz Ahmad Kábír, Moulaví Muhammad Sulaimán, Moulaví Gholám I'sá and Moulaví Tamíz-ud-Dín Aizání, in four volumes.

† The Fasúl-ul-Isturúshí was composed by Muhammad Bin Mahmúd, commonly called 'Al-Isturúshí' A. H. 625 (A. C. 1227), and is principally restricted to decisions respecting mercantile transactions.—Morl. Dig., Introd., p. ccxxxvi.

‡ The Fasúl-ul-Imádyah was written by Abú-ul-Fatah Bin Muhammad Bin Abú Bakr al-Marghínání as-Samarkandí, A. H. 651 (A. C. 1253). It comprises forty sections containing decisions respecting mercantile matters, and, being left incomplete at the author's death, was finished by Jamál-ud-Dín Bin Imád-ud-Dín. The Fusúl-ul-Imádiyah was lithographed and published in original at Calcutta in the year 1827.—Morl. Dig., Introd., p. cclxxxvi.

§ This compiler died A. H. 823 (A. C. 1420).—*Ibid.*

LECTURE I.

The Fatáwá az-Zahíriyah which contains decisions collected partly from the Khizánat-ul-Wákiyát was written by Jahír-ud-Dín Abú Bakr Muhammad Bin Ahmad al-Bukhárí.*

The Kuniyat-ul-Muniyat is a collection of decisions of considerable authority by Mukhtár Bin Mahmúd Bin Muhammad as-Záhidí Abú-ur-Rijá al-Ghazmíní, surnamed Najm-ud-Dín† who died A. H. 658 (A. C. 1259).

An-Navaví, the author of the Biographical Dictionary entitled the Tahzíb-ul-Ásmá, who died A. H. 677 (A. C. 1278), made a collection of decisions of some note, which is called the 'Fatáwá an-Navaví.' He also composed a smaller work of the same nature, entitled al-Masáil-ul-Muhimmát, arranged in the manner of question and answer.

The Khizánat-ul-Muftiyín, by Imám Husain Bin Muhammad as-Samaání, who completed his work in A. H. 740 (A. C. 1339), contains a large collection of decisions, and is a book of some authority in India.

The Khizánat-ul-Fatáwá, by Ahmad Bin Muhammad Abú Bakr al-Hanafí, is a collection of decisions made towards the end of the eighth century of the Hijrah, and comprises questions of rare occurrence. It is known and referred to in India.

The Fatáwá Tátár-khániyah was originally a large collection of Fatáwás in several volumes, by Imám Aálim

* This author died in A. H. 619 (A. C. 1222). His work has again become a basis of other collections.

† The original text of the Kuniyat-ul-Muniyat was published at Calcutta in the year 1829.

Bin Alá al-Hanafí, taken from the Muhít-ul-Burhání, the Zakhírat, the Khániyah, and the Zahíriyah. Afterwards, however, a selection was made from these decisions by Imám Ibráhím Bin Muhammad al-Halabí, who died in A. H. 956.(A. C. 1549), and an epitome was thus formed, which is in one volume, and still retains the title of Tátár-khániyah.

The Fatáwá-i Ahl-us-Samarkand is a collection of the decisions of those learned men of the city of Samarkand who are omitted or lightly passed over, in the Fatáwá Tátár-khániyah and the Jámi-ul-Fusúlain, to both of which works it may be considered a supplement.

The Fatáwá az-Zainíyah contains decisions by Zain-ul-Aabidín Ibrahím Bin Nujaim al-Misrí, the author of the Bahr-ur-Ráïk and the Ashbah wa an-Nazáïr. They were collected by his son Ahmad about A. H. 970 (A. C. 1562).

The Fatáwá-i Ibráhím Sháhí by Shiháb-ud-Dín Ahmad was composed by order of Ibráhím Sháh of Júnpúr, in the ninth century of the Hijrah. It is known in India, but is not considered to be of much authority.

The Fatáwá al-Ankiraví, a collection of decisions of al-Ankiraví by Shaikh-ul-Islám Muhammad Bin al-Husain, who died A. H. 1098 (A. C. 1686) is a work of authority.

The Fatáwá Hammádiyah, though it seems to be a modern compilation, is a work of considerable authority.*

* This work was composed by Abú al-Fatah Rukn-ud-Dín Bin Husám an-Nágúrí and dedicated to his tutor Hamád-ud-Dín Ahmad, chief Kází of Nahrwaláh. This work is said to be a modern compilation, though its date has not been precisely ascertained. It was lithographed and published at Calcutta in 1825.—Morl. Dig., Introd., p. cclxci.

LECTURE I.

Tipú Sultán ordered a collection of Fatáwás to be made in Persian by a society of the learned of Mysore. It comprises three hundred and thirteen chapters, and is entitled the 'Fatáwá-i Muhammadí.'

Mr. Harrington in his Analysis (Vol. I, 2nd Ed.) mentions a few other books of Fatáwá, *viz.*, the Fatáwá Bazázíah, the Fatáwá Nakshbandiyah, the Mukhtár-ul-Fatáwá, and the Fatáwá Karákhání. The last of these he describes to be a Persian compilation, the cases included in which were collected by Mullah Sadar-ud-Dín Bin Yákúb, and arranged some years after his death by Karâ Khán, in the reign of Sultán Alá-ud-Dín.

The following works of the present class, published at Constantinople, and containing decisions according to the doctrines of Abú Hanífah, may be noticed.

A collection of Fatwás, in the Turkish and Arabic languages, entitled the Kitáb fí al-Fikah al-Kadúsí, composed by Háfiz Muhammad Bin Ahmad al-Kadúsí, in A. H. 1226 (A. C. 1808). It was published in 1821.—Morl. Dig., Introd., p. ccxci.

The Fatáwá-i Abd-ur-Rahím Effendí is a collection of judgments pronounced at various times in Turkey, and collected by the Muftí Abd-ur-Rahím. It was printed in the year 1827.—*Ibid.*

Dabagzádeh Nuamán Effendí is the author of a collection of six hundred and seventy decisions, which is entitled the Tuhfat us-Sukúk, and was published in the year 1832. —*Ibid.*

The Jámi-ul-Ijáratín is a collection of decisions relating to the law of farming and the tenure of land, by

Muhammad Aárif. It was printed in the year 1836.—*Ibid.* p. ccxcii.

A collection of Fatwás relating to leases was published at Constantinople by M. D'Adelbourg, in the year 1838. Prefixed to this collection are the principles of the law of lease, according to the Multaka; and it is followed by an analytical table, facilitating reference to the various decisions.—*Ibid.*

Of the Fatwás which treat both of the Fikah and Faráïz, two are most generally used in India. These are the Fatáwá Sirájiyyah and Fatáwá Alamghírí.

The Fatáwá Sirájiyyah* with some principles contains a collection of decisions on cases which do not generally occur in other books.

Fatáwá Alamgírí.

The Fatáwá Alamgìríț with opinions and precepts of law contains an immense number of law cases. This work, from its comprehensive nature, is applicable to almost every case that arises involving points of the Hanífí doctrines. Although opinions of modern compilers are not esteemed as of equal authority with those of the older writers on jurisprudence, yet being composed by a great number of the most learned lawyers of the age, and by order of the then greatest person of the realm, the Emperor Aurungzeb

* This work was written by Siráj-ud-Dín Muhammad Bin Abd-ur-Rashíd Sajáwandí, author of the Sirájiyyah, the most celebrated treatise on the Law of Inheritance. Mr. Baillie, in his treatise on Inheritance, has constantly referred to this work as an authority. The Lecturer too, has occasionally referred to it, and quoted passages therefrom. An edition of this book was made here in 1827.

† This work was commenced to be written in A. H. 1067 (A. C. 1656). It has been printed here in six volumes of 4to size in the year 1828.

LECTURE I.

Alamgír (by whose name the book is designated), the Fatáwá Alamgírí is esteemed as a very high authority in India; and containing, as it does, decisions on cases of any shape based upon unquestionable authorities, this book is here referred to more frequently than any other work of a similar nature, and has not up to this day been surpassed by any work except perhaps by the Radd-ul-Muhtár* already spoken of.

Books generally used.

Of the books noticed, those generally referred to in this country are—the Hidáyah with Kifáyah or Ináyah, Vikáyah with Sharh-ul-Vikáyah; Nikáyah with Sharh-un-Nikáyáh or Jámi-ur-Ramúz, Ashbáh wa an-Nazáïr, Fatáwá Tátárkhániyah, Fatáwá-i Kází Khán, Fatáwá Hammádiyah, Fatáwá Sirájiyyah, Fatáwá Alamgírí, Tanvír-ul-Absár with Durr-ul-Mukhtár, and Sirájiyyah with Sharífiyyah.

During the long rule of the Muhammadans in India the Fatáwá Alamgírí alone appears to have been translated into Persian by order of Zéb-un-nisá, daughter of the Emperor Arungzeb Alamgír.

Since the establishment of the British Government in India, the books of Jináyah and Hudúd from the Fatáwá Alamgírí were translated into Persian under the direction of the Council of the College of Fort William in Calcutta, by the then Kázi-ul-Kuzzát Muhammad Najm-ud-Dín Khán, and were published in the year 1813, together with a Persian treatise on Tázírát, by the same author.

In the same year, the book on Tázírát from the Durr-ul-Mukhtár was translated, printed and published here by

* See *ante*, page 46.

Moulaví Muhammad Khalíl-ud-Dín under the orders of Mr. Harrington, the then Chief Judge of the late Sudder Dewany Adawlut. LECTURE I.

The Hidáyah was translated into Persian by four of the most learned Moulavís of that time and of this country, in the manner and under the circumstances set out in the following annotation. Unfortunately, however, the learned translators have, in the body of the book, inserted many things by way of explanatory remarks and illustrative expositions, instead of subjoining them in the form of notes. Furthermore, they have, in a considerable degree, deviated from the original. For all these, we are warranted to say, that the Persian version of the Hidáyah does not represent a true picture of the original (*a*).

Macnaghten's Principles of Muhammadan Law were translated into Urdu and lithographed many years ago in Dehli. Another translation of the same work was made and published in this city (Calcutta) a few years ago.

ANNOTATIONS.

(*a*). When the attention of the British Government in Bengal was first directed to the necessity and importance of procuring some authentic guide for aiding them in their superintendence over the native judicature, some learned Muhammadans were consulted on the occasion, and they advised that, previous to any other step, a translation should be executed of some work which, by comprehending, in the same page, the *dicta* of the principles might serve at once as an exemplar and instructor; and, for this purpose, they recommended the Hidáyah on account of its being regarded (particularly throughout Hindústán) as of canonical authority, and uniting in an eminent degree all the qualities required. But as the Arabic in which this Treatise was written is known only among the learned, and the style of the author is particularly close and obscure, they at the same time proposed that under the inspection of some of their most intelligent doctors, a complete version

LECTURE I.

A Persian translation of the Sirájiyyah with its commentary entitled the Sharífiyyah was made and published so far back as the year 1812 by Moulaví Muhammad Ráshid, under the direction of Warren Hastings. I, however, have not met with this translation which is spoken of in terms of disparagement by Sir William Jones.

An Urdu translation of the important parts of the Sirájiyyah was made in the year 1861, bearing the title of Faráíz-i Hindiyah by Moulaví Muhammad Ismáíl, a vakeel of the late Sudder Dewany Adawlut of Calcutta.

English Translations.

The work entitled the 'Bighyat-u-Báhis,' by Al-Mutakannah, which is a tract treating of Zaid's system of Faráíz, was translated into English by Sir William Jones.*

ANNOTATIONS.

should be formed in the Persian language, which would answer the double purpose of clearing up the ambiguities of the text; and (by being introduced into practice) of furnishing the Native Judges of the Courts with a similar guide and a more intrinsic preceptor than books written in a language of which few of them had opportunities of attaining a complete knowledge. In conformity with this advice, four of the principal and most learned Moulavís were engaged to translate the whole of the Hidáyah from Arabic into Persian.—(*Vide* Hidá. Prel. Disc., pp. 44, 45.)

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* The merit and demerit of his translation of this tract are justly expressed by the learned Translator himself. "It will be seen in the Sirájiyyah," says he, "that the system of Zaid, though in part exploded by Abú Hanífah, had very powerful supporters, and its author is always mentioned in terms of respect; it is the system which I published in London above ten years ago; and I am not surprised, that, without a Native assistant or even a marginal gloss, I could not then interpret the many technical words, which no Dictionary explains, except in their popular sense; but, though my literal version of the tract by 'Al-Mutakannah' seems for pages together like a string of enigmas, yet the following work makes every sentence in it perfectly clear; and the original of which was engraved from a very old manuscript,

A translation of the Sirájiyyah also was made by Sir William Jones, who at the same time made an abstract translation of its celebrated commentary (the Sharífiyyah)* with the addition of illustrations and exemplifications from his own brain and pen,* and printed the latter as quite a different book from his translation of the original. The work so published by him was, therefore, very inconvenient for reference, more especially as it had neither a summary of contents, nor an index. It is therefore, not a matter of surprise, that the book remained almost unknown and out of use. With a view to remove this great inconvenience for the reader, as also to render it easy of reference, both the text and commentary were re-printed and published by me, each passage of the latter being placed immediately under the text to which it referred; but as the work was merely a re-print, or a new edition of the above, I

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appears to be a lively and elegant epitome of the Law of Inheritance according to Zaid, but manifestly designed to assist the memory of young students, who were to get it by heart, when they had learned the rules from some longer treatise, or from the mouths of their preceptors."—Sirájiyyah Pref., p. vi.

Mr. Morley, however, says: "In the Preface of this work the Translator falls into error, by stating, that 'as the author himself was an Imám, his decisions on that account are considered binding by the sect of Alí, which the Indian as well as the Persian Muhammadans profess.' Now setting aside the fact that the Shíah faith has never at any time had great weight in India, where, even at Lucknow, the seat of heterodox majesty itself, the tenets of the Sunnís are adhered to, the mere circumstance of Ibn-ul-Mutukanah being denominated 'al-Imám' would be in itself sufficient to prove that he was not a Shíah writer, since that title, as we have seen, is considered by the Shíahs to be sacred and is never applied by them to any other than Alí and his immediate descendants. Moreover, the 8th, 9th and 10th pages of the Bighyat-ul-Báhis, if they can be construed to mean any thing, seem to point at the doctrines of the increase—a doctrine which is not admitted by the Shíah lawyers."

* "The learned Judge," says Mr. Morley, "has executed his task with his accustomed ability; but although he blames, with apparent reason, the diffuseness of the Persian translator, it may be doubted whether he himself has not erred in the opposite extreme."

LECTURE I.

had of course no authority to alter the original where it appeared to be inaccurate or erroneous.*

It ought, nevertheless, to be borne in mind, that when (to use the learned critic's own words) 'the Sirájiyyah is very brief and abstruse,' it is almost impossible to make its translation otherwise, unless it gave only the purport of the original. The learned translator's apology with respect to the above seems therefore quite reasonable and acceptable. The same is as follows:—

"When it is admitted, that a desire of extreme brevity has often made the Sirájiyyah obscure, the reader should, in candour allow, that every author must appear to great disadvantage in a literal translation, especially when his own idiom differs totally from that of his translator, when his terms of art must be rendered by new words, which use alone can make easy, and when the system, which he unfolds to his countrymen, has no resemblance to any other, that the world ever knew."—Sirájiyyah, Preface, page iii.

For my own part, however, I cannot say whether it was owing to my having previously studied the original,

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* Some of those errors have been noticed in these Lectures.

"Mr. Neil Baillie," says Mr. Morley, "has well observed of Sir William Jones's Translation: 'The Sirájiyyah is very brief and abstruse and without the aid of a commentary or a living teacher to unfold and illustrate its meaning, it can with difficulty be understood by even Arabic scholars. It is, therefore, not a matter of surprise that its translation by Sir William Jones should be almost unknown to English lawyers, and be perhaps never referred to in His Majesty's Supreme Courts of Judicature in India. With the assistance of the Sharífiyyah it is brought within the reach of the most ordinary capacity; and if the abstract translation of that commentary for which we are also indebted to Sir William Jones, had been more copious, nothing further would have been requisite to give the English reader a complete view of this excellent system of Inheritance."—Morl. Dig., Introd., cclxxxi & cclxxxii.

or having repeatedly read the translation and collated the same with the original, that I do not feel any difficulty to understand the translation in question. On the other hand, I regret to say, that the learned critic has himself been charged by others with the same fault. This will appear when his own work will be spoken of.—*See* the Foot note at page 61.

A translation of the selected portions from the two books of the Fatáwá-i Álamghírí, which comprise the subject of sale, was published by Mr. Neil Baillie.* The rule adopted in making these selections was, as is said by the learned translator himself, to retain every thing of the nature of a general proposition, and to reject particular cases, except when they were considered to involve or illustrate some principle or maxim of law.

Besides the above, a few works on the Muhammadan law are said to have been translated and written in French. But as those works can scarcely be used by the English students of this country generally not acquainted with the French language, I refrain from taking any further notice of the same.

Translation of Hidáyah.

The Persian version of the Hidáyah, already noticed,† was, by order of Warren Hastings, commenced to be translated into English by Mr. James Anderson, but shortly after, he being engaged in an important foreign employ-

* "The law of sale by Mr. Baillie, was prepared from the Fatáwá-i Alamgíri. He declares it as a faithful transcript of the original, but perhaps it may be regretted that that gentleman did not adopt the course, which seems to have suggested itself to him, of endeavouring to render more readable by re-casting the materials."—Remarks by Mr. William Sloan contained in the edition made by him of Macnaghten's Principles of Muhammadan Law with valuable additions.

† See *ante*, page 57.

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ment, the translation was finished* and revised by his colleague, Mr. Charles Hamilton. It is a matter of regret that the translation in question was not executed from the original Hidáyah itself, instead of from its Persian translation which contains frequent explanatory remarks and illustrative expositions interpolated in the book itself instead of being subjoined by way of notes. Add to this, the Persian translators have, in a considerable degree, deviated from the original. (*a*)†

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(*a*). Some of the interpolations and deviations noticed by the English translator, as well as the defence and apology made by him, are as follows:—"When," says he, "the English translator came to examine his text, and compare it with the original Arabic, he found that except a number of elucidatory interpolations, and much unavoidable amplification of style, it, in general, exhibited a faithful copy, deviating from the sense in a very few instances, in some of which the difference may perhaps be justly attributed to the inaccuracy of transcriptions; in one particular it is avowed and justified by the Moulavís, because of an alleged error of the author. Many of the interpolations are, indeed, superfluous, and sometimes exceed, both in length and frequency, what could be wished. They, however, possess the advantage of completely explaining the text from which every reader may, for the most part, with ease discriminate them, since they almost uniformly consist of illustrative expositions of passages beginning with,—'that is,' 'in other words,' and so forth;—and where the composers of the Persian version have in a considerable degree deviated from the original, the English translator has remarked upon it, and has, in several such instances, subjoined a *verbatim* translation from the Arabic, in order to point out the difference with the greater precision. One deviation, indeed, in point of form, rather than of

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* The learned Translator has, however, omitted to render in English the chapters on purification, prayer, fasting, and pilgrimage, which form parts of the spiritual law (ibádat) for the reasons stated in his preliminary discourse (p. lii). Had he omitted also the book on slavery which constitutes about one-third of the whole Hidáyah, he would have saved to himself much labour, and pains as well as expense.

† See *ante*, page 57.

Of the Digests of Muhammadan law in English, the first appears to be the Chapter on Criminal law of the Muhammadans as modified by regulations. This is incorporated in Harrington's Analysis of Bengal Regulations.* The above, so far as it extends, is said to have superseded reference to any other work on the subject.

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substance, he has not thought it necessary to notice, as it runs regularly through all the work, and he therefore conceived that a prefatory explanation of it would suffice for the whole. In the objections and replies, which frequently occur, the Moulavís have observed an arrangement, somewhat varying from the original, and which they probably adopted for the sake of greater perspicuity. The only remaining difference between the Arabic text and the Persian version of it worthy of notice, is, that in the latter we have a particular definition of terms, a point in which the original is totally defective, but which is, doubtless, indispensably requisite to persons not conversant in the Arabic tongue."

The learned translator then adds: "It may perhaps be urged that, instead of having recourse to an intermediate version, the translation should have been made at once from the Arabic, by which means the work would have been presented as a more close and accurate picture of the original. Had the translator been at liberty to pursue this plan, much labour would indeed have been saved him; some reasons are, however, to be assigned, which, when duly considered, will perhaps be found to give an indisputable preference to the mode that has been adopted. 1. As the Persian version was designed for the use and instruction not merely of the English scholar, but also of the Native Magistrate, and was, therefore, likely to be introduced into practice, it was indispensably requisite that the English translation should be taken from it rather than from the Arabic, in order to preserve an exact and literal uniformity between the two standards of judicial determination. 2. The Arabic is remarkably close in its idiom. Hence a literal translation from the Arabic would have left the sense, in many places, as completely unintelligible to the English reader as the original itself. In following the Persian version, therefore, (if we except the interpolations already mentioned and accounted for,) the translator has done

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* Vol. I, p. 223, *et seq.*, 2nd edition.

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In his abstract of the Bengal Regulations, Mr. Richard Clarke has also given a concise exposition of the Muhammadan Criminal Law.

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little more than what he must have done, at any rate to render himself understood,—namely, given the sense in a fuller and more explicit manner than the original author, but without in any degree departing from, or altering, the tenor of the text. 3. The persons employed in the composition of the Persian version were themselves possessed of deep legal knowledge, qualified, both by their academical rank and judicial stations, to pass decrees, and perhaps as well versed in the Mussulmán institutes as their author. Hence their interpolations proceed from an authority perfectly competent, and being (as in many instances they certainly are) of essential utility, must be considered as a valuable addition to the text. Their interpolations are, in fact, nothing more than explanatory remarks, inserted in the body of the work instead of being subjoined in the form of notes. Had the translator conceived himself at liberty to use his own unlimited discretion, he could perhaps have adopted this mode, as being more agreeable to the literary fashions of his own country, in all except original compositions. But this is a plan seldom adopted by Oriental writers; and the translator had a particular duty prescribed to him, which (except in some very particular cases) he considered himself bound implicitly to fulfil, for it was his business to give the Persian version of the Hidáyah an English dress both in order and substance, since otherwise it would have been impossible to preserve the exact uniformity necessary to authenticate the English text in cases of future reference or appeal.—Hidáyah, Prel. Disc. pp. xlv—xlviii.

From what is above stated, the reader will be able to judge the merit and demerit of the Persian version as well as of the Translation made therefrom. Had the Persian Translators interpolated those explanations, expositions and illustrations from any of the commentaries of acknowledged authority, such as the Ináyah, Kifáyah, &c., with the mention of the author's name, they could, and would, have been considered as authorities. As to the learned Translator's remark, that 'the persons employed in the composition of the Persian version were themselves possessed of deep legal knowledge, qualified both by their academical rank and judicial stations, to pass decrees, and were perhaps as well versed in the Mussalmán institutes as their author,' I have to inform

The Principles of the above law, as it was in force in Bengal, were laid down by Mr. Beaufort in his elaborate and excellent Digest of Criminal Law for the Presidency of Fort William. LECTURE I.

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my readers that the author of the Hidáyah was a Shaikh-ul-Islám;* that being a *Mujtahid*, was himself qualified to pass decisions upon cases (real or supposed) which should operate as a precedent with others; that his work is said to have, like the *Kurán*, eclipsed all the (law) books composed before it; and that the Muhammadan law being sacred to the Musalmáns, they do not acknowledge any lawyer to be an unquestionable authority unless he excelled by eminent virtue and piety as well as by learning, all of which were combined in the author of the Hidáyah, and in all of which he excelled all the authors of Digests. The subjoined is a portion of what is mentioned with respect to the Hidáyah in the Kashf-uz-Zunún by Hájí Khalífah, who is a high authority not only among the Muhammadans but also among the European Doctors.†

هداية في الفروع لشيخ الاسلام برهان الدين علي بن ابي بكر المرغيناني الحنفي * قال الشيخ اكمل الدين روى ان صاحب الهداية بقي في تصنيف الكتاب ثلث عشرة سنة وكان صائما في تلك المدة لم يفطر اصلا وكان يجتهد ان لايطلع على صومه احد — فكان ببركة زهده و ورعه كتابه مقبولا (بين العلماء) — و هوالذى قيل فى شانه —

ان الهداية كالقرآن قد نسخت * ماصنفوا قبلها في الشرع من كتب *
فاحفظ قواعدها واسلك مسالكها * يسلم مقالك من زيغ و من كذب *
* كشف الظنون عن اسامي الكتب و الفنون *

The translation of the above is as follows:—

The Hidáyah fí al-farú is by Shaikh-ul-Islám Burhán-ud-Dín Bin Abú Bakr Al-Murghínání, a follower of the Hanífí doctrines.

Shaikh Akmal-ud-Dín states that the author of the Hidáyah took thirteen years to compose the work, during which period he fasted (every day) and did not break his fasting (during day-period). He took a great care that none be apprised of his so doing. By the blessing or

* The head of religion, *i. e.*, the high priest, and the Muftí or lawgiver of Mussalmáns. See Kashf-uz-Zunún.

† *Vide* Morley's Digest, Introduction, page ccxlii.

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But, since the promulgation of the Indian Penal Code, the works as above have become almost useless.

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merit of his austerity and abstinence his book became approved (by the learned). So that it is said in respect thereof:—

"The Hidáyah, like the *Kurán*, has rendered useless the books on law that were composed before it."

"Commit, therefore, to memory its principles, and follow its vestiges or directions, and (then) what you say will not be erroneous and fallacious."*

Thus no author of a Commentary or Digest even of Arabia can be compared with the author of the Hidáyah, much less a Moulaví of India, be he ever so learned a man. The very idea of the interpretation of law given by a Moulaví or Moulavís of India being equal in authority with the Hidáyah is considered to be absurd not only by the Muhammadans of other countries, but also of this country. It is, on the other hand, universally declared, that the Persian, as well as the English translation (the latter being made from the so-called Persian version,) are not translations of the Hidáyah (in Arabic), but as of a different book containing the text of the Hidáyah with other matters as already stated. It was for this reason that I had been requested by an eminent barrister, still attached to the High Court, to make a translation of the original Hidáyah: and, accordingly, I had commenced the work, and rendered in English the Chaptér on Sale; but finding that my pains and labours in properly executing the work would far exceed the reward, I was dissuaded to continue with it. In translating the above Chapter, I, how-

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* Professor Gustavus Fluegel's version of the above passage runs thus:—"El-Hidáyet fi el-forú, institutio recta de articulis juris (Hanefitici) derivatis, auctore Sheikh el-islám Borhán-ed-dín Alí Ben Abi Bekr Marghinání Hanefita."

"Sheikh Akmal-ed-dín tradit, auctorem libri Hedáyet in eo componendo tredecim annos consumisse jejunioque nunquam soluto per hoc spatium jejunasse, et omnem operam impendisse, ne quisquam se jejunare animadverteret. Ob benedictionem ab ejus abstinentia et temperantia proficiscentem liber hic (a viris doctis) magno cum applausu exceptus est, et hi sunt versus, qui ejus pretium describunt:"

"Certe *Hidáyet* Corani instar jam describendo vulgata est.

Neque ante eam libros, de legibus ei similes composuerunt.

Manda igitur memoriae praecepta ejus fundamentalia ejusque vestigia sequere;

Tum oratio tua ab erroribus incolumis erit et mendaciis."—Kashf-uz-Zunún, vol. vi, p. 479.

An abstract of Muhammadan law, which is from the pen of Lieutenant-Colonel Vans Kennedy, will be found in the

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ever, had a good opportunity of collating the existing English translation with the original Hidáyah, and I subjoin the first passage in original of the above Chapter with its translation made as faithfully as it lay in my power to make, and also the translation which was already made from the Persian version, in order that the reader may collate them with the original, and form an idea of the translation which is still passing as being the version of the Hidáyah :—

البيع ينعقد بالايجاب والقبول اذا كانا بلفظي الماضي — مثل ان يقول احدهما بعت والاخر اشتريت - لان البيع انشاء تصرف والانشاء يعرف بالشرع والموضوع للاخبار — قد استعمل فيه • فينعقد به — ولاينعقد بلفظين احدهما لفظ الماضي والاخر لفظ المستقبل — بخلاف النكاح — وقد مر الفرق هناك • و قوله رضيت بكذا او اعطيتك بكذا او خذه بكذا في معنى قوله بعت واشتريت — لانه يودي معناه والمعني هوالمعتبر في هذه العقود — ولهذا ينعقد بالتعاطي في النفيس والخسيس هو الصحيح لتحقق المراضاة • قال واذا اوجب احد المتعاقدين البيع فالاخر بالخيار ان شاء قبل في المجلس وان شاء رده • هداية جلد ثالث صفحه ١ •

Translation:—"Sale is contracted by declaration and acceptance if these be (expressed) by two words of the past tense (in the indicative mood), as when one of the two (contracting parties) says, 'I have sold,' and the other, 'I have bought;' inasmuch as, sale is the taking place (inshâa) of a transfer; and the taking place of a transfer is known from (the precept of) the law. In general acceptation, however, it (the word 'inshâa') signifies 'announcement,' in which sense it is used (in the dictionaries): so it is thereby contracted, and not by two words, the one of which is a word (verb) in the past tense, and the other in the future tense, or in the indicative mood, (though) it is otherwise in marriage: and the difference (between the contracts of sale and marriage) is known in this place. Thus the expression, 'I am contented with this,' or 'I have given you for this,' or 'take it for this,' used by him (one of the contracting parties), is the same as his saying: 'I have sold,' or 'I have bought,' because they indicate the meaning of it (the sale), and it is the meaning to which regard is to be had in such contracts: hence it may be contracted by mutual surrender (tuátí) of the goods of great as

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Journal of the Royal Asiatic Society. "This work," says Mr. Morley, "is well worthy the attention of the student."

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well as of small value, and the same is valid by reason of mutual consent. And if either of the contracting parties make the declaration of sale, then, in the same meeting, it is optional with the other to accept it, if he chooses, or to refuse it, if he does not choose."

The translation made by Mr. Hamilton of the foregoing passage of the Hidáyah runs thus:—

"Sale is completed by declaration and acceptance, the speech of the first speaker of the contracting parties being termed the declaration, and that of the last speaker, the acceptance. Thus, if Zeid should first say to Omar 'I have sold to you a particular article belonging to me for ten *dirms*,' and Omar should then say 'I have bought that article belonging to you for the said price,' the speech of Zeid is in that case termed the declaration, and that of Omar, the acceptance. If, on the contrary, Omar should first say to Zeid 'I have purchased a particular article belonging to you for ten *dirms*,' and Zeid should then say 'I have sold the same to you for the said price,' the speech of Omar is in this case termed the declaration, and that of Zeid, the acceptance."

"It is a necessary condition that the declaration and acceptance be expressed in the present or preterite tense indicative; for if either be expressed in the imperative or future the contract is incomplete. Thus, if the seller should say to the purchaser, 'buy this article belonging to me for ten dirms,' and the purchaser reply, 'I have bought the said article for ten dirms,'—or, if the seller should say 'I have sold this article to you for ten dirms,' and the purchaser reply, 'I will purchase the said article for ten dirms,'—in neither case would the sale be binding."

"It is to be observed that in the same manner as a sale is established by the words 'I have bought' or 'I have sold,' so also is it established by any other words expressive of the same meaning;—as if either of the parties, for instance, should say, 'I am contented with this price,' or 'I have given you this article for a certain price,' or 'take this article for a certain price;' because, in sale, regard is had to the spirit of the contract, and the particular use of the words *bought* and *sold* is not required; whence it is, that sale may be contracted simply by a *Taáta* or mutual surrender, where the seller gives the article sold to the purchaser, and the purchaser in return gives the

The work entitled the Principles and Precedents of Muhammadan law, written by Mr. (afterwards, Sir) William Hay Macnaghten, is the clearest or easiest, if not the amplest or sufficient, work on that law hitherto written in English. It consists of two parts, the first of which contains rules relative to the doctrines of Inheritance (including the tenets of the Shíah sectaries), contracts and several other subjects. Of these, again, the first chapter, which treats of Inheritance of the Sunní sect, is fuller than the second, which is on the Inheritance of the Shíah sect. The other chapters (namely, those on sale, shufá or pre-emption, gifts, wills, marriage, dower, divorce, parentage, minority and guardianship, slavery, endowments, debts and securities, claims and judicial matters) are, indeed, very short and insufficient. That they are so, may be concluded from the

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price to the seller, without the interposition of speech. Some have alleged that this mode of sale by a mutual surrender is valid with relation to things of small value; but not otherwise. It is, however, certain that sale by a mutual surrender is valid in every case, as it establishes the mutual consent of the parties."

"*Objection.*—It would appear that the sale, as recited above, to be rendered complete by the words 'take this,' &c., is not valid, as it was before declared to be a necessary condition that both declaration and acceptance should be expressed in the present or preterite tense indicative, and neither of them in the imperative."

"*Reply.*—In this case, the words 'take,' &c., are not of themselves a declaration, but merely indicate the existence of a declaration in the preterite tense;—as if the seller had first said 'I have sold this thing,' and were then to add 'take this,' &c., for the command is consequent to the declaration."

"If either of the parties make a declaration, it is in the power of the other to withhold his acceptance or refusal until the breaking up of the meeting; and their power is termed the option of acceptance."—Hidáyah, Book xvi, Chapter i, Vol. ii, p. 361."

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very number of the pages devoted to each of them. The chapter on the Inheritance of the Sunnís extending over 32 pages, and that of the Shíahs over 10, while the other ten chapters occupy only 41 pages. The second part, which consists of approved legal opinions with authorities delivered by the law-officers in the several Courts of judicature subordinate to the Presidency of Fort William, and which relate to the subjects treated of in the first part, is, indeed, very useful. The second edition of this work, made by Mr. William Sloan, then a pleader of the late Madras Sudder Court, with additional notes, an appendix containing questions for students, and an alphabetical digest of the principles of decisions on the law and customs, relating to Muhammadans (passed by the Privy Council and the late Supreme and Sudder Courts of Madras, Calcutta, Bombay and the North-Western Provinces, from 1793 to 1859) selected from the latest published reports, has rendered the work more valuable than it was. But what is to be still regretted is, that the mistakes and defects which existed in the first edition are still to be found in the above edition, as well as in the edition of the first part of the said work made in England by Professor Wilson.

Mr. Neil Baillie's Muhammadan Law of Inheritance according to Abú Hanífah and his followers, with appendix containing authorities from the original Arabic, is an excellent work of the kind. It is a matter of regret that in the circulation and use of this work the author has not been so singularly felicitous as Sir William Macnaghten.

The treatise on inheritance, gift, will, sale and mortgage, compiled by Mr. F. E. Elberling, a Danish Judge at Serampore, in the year 1844, contains principles of Muhammadan law with those of the other laws as used in

this country. The principles of Muhammadan law, as contained in that work, being sometimes blended with the principles of other laws, and scattered over the whole book, the Lecturer, in order to save the reader the trouble of hunting them over the several parts of the treatise, had collected and printed them together in a separate book. But notwithstanding this, the work in question is rarely consulted and referred to, the same being considered inferior to that of Macnaghten's work on Muhammadan law, which is frequently cited therein as authority.

In the year 1865, Mr. Neil Baillie, the author of the two works already mentioned,* has completed and published a Digest of Muhammadan law on all the subjects to which the Muhammadan law is usually applied by the British Courts of Justice in India. It gives translations of almost all the principles and some of the cases contained in the Fatáwá Alamgírí, the great Digest of Muhammadan law in India,† and quotes occasionally other available authorities.‡ Being generally close to the original, and fully

* *Ante*, page 10. † *Ante*, page 55.

‡ "I have freely quoted," says the learned author, "from the Hidáyah and its two celebrated commentaries, the Kifáyah and Ináyah, as well as other available authorities, wherever I thought it necessary for a more complete exposition of the law."

"Many of the cases contained in the Fatáwá Alamgírí are not likely to occur again, and may be omitted without breaking the continuity of the work, or impairing its general utility. In making my selections from it, I have followed the example of the compilers, in so much that I have seldom attempted to give the meaning of the original writers in my own language. I have preferred to allow them, as it were, to speak for themselves, and have adhered to literal translation as strictly as the different idioms of the Arabic and English languages would admit. My work may thus be deemed in the three first and eleventh books, an abridged translation of the corresponding books of the Fatáwá Alamgírí, with occasional extracts from other authorities. The other books are more in the nature of selections from the work generally, though in these also the corresponding books of the original digest have been followed as closely as possible. This has saved the necessity of reference to its pages, except where the extracts are not consecutive. The references to other authorities are perhaps more numerous in these parts of the work than in the books specially mentioned."—B. Dig., Pref., p. ix.

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dealing with the subjects it treats of, this work must be said to be authentic, as well as the amplest of the Digests of Muhammadan law hitherto written in English according to the doctrines of the Hanífí sect.

The people to whom Muhammadan law is applicable.

These are the law books translated and written since the passing of the Statute 21, Geo. III, Chap. 70, which provides that "their inheritance and succession to lands, rents and goods, and all matters of contract and dealing between party and party shall be determined, in the case of the Muhammadans, by the laws and usages of Muhammadans, and, in the case of Gentoos, by the laws and usages of Gentoos;" as well as since the promulgation of Section XV, Regulation IV of 1793, which also provides that "in suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Muhammadan law with respect to Muhammadans, and the Hindú law with regard to Hindús, are to be considered as the general rules by which the Judges are to form their decisions. In the respective cases, the Muhammadan and Hindú law-officers of the Courts are to attend to expound the laws."*

* This Regulation, as well as the Statute cited, seems to have been enacted at the instance of Sir William Jones, who, in his letter to the Chief Government of India, strongly recommended the enforcement of the Hindú law and Muhammadan law. The sentiments therein expressed by that venerable Judge are truly worthy of him. "Nothing," says he, "could be more obviously just than to determine private contests according to those laws, which the parties themselves had ever considered as the rules of their conduct and engagements in civil life; nor could any thing be wiser than by a legislative act, to assure the Hindú and Mussalmán subjects of Great Britain, that the private laws, which they severally hold sacred, and violation of which they would have thought the most grievous oppression, should not be suppressed by a new system, of which they could have no knowledge and which they must have considered as imposed on them by a spirit of rigour and intolerance. So far the principle of decision between the native parties in a cause appears perfectly clear; but the difficulty lies (as in most other

Accordingly, suits regarding succession, inheritance, marriage, caste, and all religious institutions of Mussalmáns and Hindús in India were decided agreeably to the principles and rules of the Muhammadan and Hindú laws. If a Judge trying any such suit entertained a doubt respecting the accuracy or sufficiency of the law exposition or opinion, delivered by the law-officer attached to his Court, either from the objections of a party or parties to the suit, founded on other law opinions exhibited by them, or from a reference to the books translated into English, or compiled in that language, he was enabled to test the accuracy of that opinion by obtaining a further exposition from the law-officers of the superior Court or Courts.* The Judge was also allowed to receive law opinions (referring to, or quoting, authorities,) tendered to him by any party or parties to the suit in support of his or their claims, and (if necessary) to test the accuracy of such

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cases) in the application of the principle to practice; for the Hindú and Mussalmán laws are locked up for the most part in two very difficult languages, Sanscrita and Arabic, which few Europeans will ever learn, because neither of them leads to any advantage in worldly pursuits."

"The obvious remedy for this evil had occurred to me before I left England, where I had communicated my sentiments to some friends in Parliament and on the Bench in Westminster Hall, of whose discernment I had the highest opinion, and those sentiments I propose to unfold in this letter with as much brevity as the magnitude of the subject will admit."

"It would not be unworthy of the British Government to give the natives of these Indian Provinces a permanent security for the due administration of justice among them, similar to that which Justinian gave to his Greek and Roman subjects" *Vide* Preface to Colebrooke's Digest of Hindú Law.

This letter is dated the 19th of March 1788. On the same date, the then Governor General, Marquis Cornwallis, with the concurrence of the members of Council, accepted the offer in terms honorable to the proposer and expressive of the most liberal sentiments. "The object of your proposition" they say, "being to promote due administration of justice, it becomes interesting to humanity, and it is deserving of our particular attention, as being intended to increase and secure the happiness of the numerous subjects of the Company's provinces." See *Ibid.*

* *Vide* Sec. 15 of Reg. iv, 1793; Sec. 3, Reg. viii, 1795; and Sec. 4, Reg. ii of 1798.

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opinion by referring it to his own law-officer, or to the law-officer of superior Courts, in order that he might determine on its due weight and application to the case. In this mode, justice was administered to the Hindú and Muhammadan subjects of the British Government in India—a mode not only satisfactory to those subjects which constitute the largest part of the population of this vast empire, but also one of the best means of laying a deep foundation in the loyal attachment and grateful affections of millions and millions of people, whose well-directed industry (to use again the noble sentiments of Sir William Jones) would add largely to the wealth of Britain, and who ask no more in return, than the protection of their persons and places of abode, justice in their temporal concerns, indulgence to the prejudices of their old religion, and the benefits of those laws, which they have been taught to believe sacred, which alone they can possibly comprehend,*

* With respect to the general mode of governing the subjects in India, the same wise and philanthrophic gentleman further observes: "In the course of nine years, I have seen enough of these Provinces, and of their inhabitants, to be convinced, that if we hope to make our Government a blessing to them, and a durable benefit to ourselves, we must realize our hope, not by wringing, for the present, the largest possible revenue from our Asiatic subjects, but by taking no more of their wealth than the public exigencies and their own security may actually require, not by diminishing the interest which landlords must naturally take in their own soil, but by augmenting it to the utmost, and giving them assurance that it should descend to their heirs;—when their laws of property, which they literally hold sacred, shall in practice be secured to them,—when the land-tax will be so moderate, that they cannot have a tolerable pretence to rack their tenants,—when they shall have a well grounded confidence, that the proportion of it will never be raised, except for a time on some great emergence, which may endanger all they possess,—when either the performance of every legal contract shall be enforced or a certain or adequate compensation be given for the breach of it,—when no wrong shall remain unredressed,—and when redress shall be obtained at little expense, and with all the speed that may be consistent with necessary deliberation;—then will the population and resources of Bengal and Behar continually increase, and our nation will have the glory of conferring happiness on considerably more than twenty-four millions (which is at least the present number) of their native inhabitants, whose cheerful industry will enrich their benefactors, and whose attachment will secure the permanence of dominion.—Preface to the *Sirájiyyah*, pp. xii & xiii.

and which alone, (I would add), they earnestly desire to be governed by in the administration of justice. "Such as their law is," says another high minded Judge, "they have a right to an administration of it, among the parties themselves; to deprive them of this right, would have been rigorous in a civil, and intolerant in a religious, point of view; for their laws and their religion are so blended together that the Government could not disturb the one without doing violence to the other: their own is the only law to be administered to them." The salutary sections of the Statute and Regulations cited, were, it must be admitted, most wisely enacted, and most prudently adopted in practice by the officials of the Honorable East India Company.*

Of late, however, the employment of Muhammadan and Hindú law-officers has been dispensed with, perhaps principally upon the notion that the English books (on those laws) which have been hitherto published, as well as the cases which have been hitherto decided, are sufficient to enable and warrant a Judge to pass a correct decision. The native lawyers (at least most of them) are, however, of opinion, that the Hindú and Muhammadan law books in English are not sufficient to enable judicial officers

* "The permanency of any foreign dominion," says the learned translator of the Hidáyah, "and indeed the justification of holding such a dominion, requires that a strict attention be paid to the ease and advantage, not only of the governors, but of the governed; and to this great end nothing can so effectually contribute as preserving to the latter their ancient established practices, civil and religious, and protecting them in the exercise of their own institutes; for, however defective and absurd these may in many instances appear, still they must be infinitely more acceptable than any which we could offer; since they are supported by the accumulated prejudice of ages, and in the opinion of their followers, derive their origin from the Divinity himself.'—Hidáyah, Preliminary Discourse, page iv.

LECTURE I.

to give correct judgments in any cases of Hindú law or Muhammadan law; that in order to enable them to decide cases of Hindú law and Muhammadan law, the books which were and are generally consulted by the Pundits and Moulavís* should be translated into English; that the translations already made should be revised, and that the judicial officers, entrusted with the trial of such cases, should (like the Pundits and Moulavís) pre-possess a thorough knowledge of those laws, without which it is very difficult for any of them to pick out the conclusive rule relative to the point at issue; since it is not unfrequently the case that in one part of a book a principle appears to be laid down as decisive, while in another part of the same work, or in another book of equal or superior authority, will be seen a passage which refutes and explodes the former and conclusively establishes another principle. It is, therefore, difficult for such persons, as would not thoroughly study and digest them, to be able readily to discover the conclusive principle or decision regarding any point of law; and unless they were possessed of such knowledge, it is not safe to put into their hands for decision cases of Hindú law and Muhammadan law, lest in going to deal them out they should, as wisely remarked by Sir Francis Macnaghten, subject the parties to wrong.† While, therefore, the native community praise the Government for introducing the Hindú law and Muhammadan law into the standard of study for the law students, they at the same time regret, that proper

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* See *ante*, page 56.

† "Give them," says Sir Francis Macnaghten, "not any laws, but their own; yet under pretext of dealing those out, let us not subject the people to wrong."—Cons. H. L., Pref., pp. v & vi.

means are not afforded to the students to enable them properly to learn those laws,—the present system (adopted in the Presidency College) of imparting to them a knowledge of the laws in question being rather insufficient. LECTURE I.

It is, therefore, confidently to be hoped, that after abolishing the law-officers, the Government, who have recently introduced the study of the Muhammadan as well as the Hindú law, will be most graciously pleased to adopt such measures as will enable the students to be properly and efficiently instructed in those laws which most of them have inherited from their ancestors, and which alone they know to be their own!

LECTURE II.

ON SHARERS AND RESIDUARIES.

Preliminary Remarks.

THE heirs are of three descriptions: 1—Sharers, 2—Residuaries, and 3—Distant kindred. The sharers and residuaries inherit simultaneously if they occur together in one and the same case, as in the instance of there being two daughters and three brothers. The distant kindred inherit in default of residuaries as well as of sharers.

The greater part of the Muhammadan Law of Inheritance is founded upon the following passages of the *Kurán*:—"God hath thus commanded you concerning your children. A male shall have as much as the share of two females; but if they be females only, and above two in number, they shall have two-third parts of what the deceased shall leave; and if there be but one, she shall have the half: and the parents of the deceased shall have each of them a sixth part of what he shall leave, if he have a child; but if he have no child, and his parents be his heirs, then his mother shall have the third part: and if he have brethren, his mother shall have a sixth part, after the legacies which he shall bequeath and his debts be paid. Ye know not whether your parents or your children be of greater use unto you. This is an ordinance from God, and God is knowing and wise. Moreover, ye may claim half of what your wives shall leave, if they have no issue; but, if they have

issue, then ye shall have the fourth part of what they shall leave, after the legacies which they shall bequeath and the debts be paid: they also shall have the fourth part of what ye shall leave, in case ye have no issue; but if ye have issue, then they shall have the eighth part of what ye shall leave, after the legacies which ye shall bequeath and your debts be paid: and if a man or woman's substance is inherited by a distant relation, and he or she have a brother or sister, each of them two shall have a sixth part of the estate. But if there be more than this number, they shall be equal sharers in the third part, after payment of the legacies which shall be bequeathed, and the debts, without prejudice to the heirs." "They will consult thee for thy decision in certain cases; say unto them, 'God giveth you these determinations concerning the more remote degrees of kindred.—If a man die without issue, and have a sister, she shall have the half of what he shall leave; and he shall be heir to her, in case she have no issue; but if there be two sisters, they shall have, between them, two-third parts of what he shall leave: and if there be several, brothers and sisters, a male shall have as much as the portion of two females. God declareth unto you, these precepts, lest ye err: and God knoweth all things."*

* Sale's *Kurán*, Chapter iv.

The Mosaic Law on the subject of Inheritance is more brief and less comprehensive: "And thou shalt speak unto the children of Israel, saying, 'if a man die, and have no son, then ye shall cause his inheritance to pass unto his daughter; and if he have no daughter, then ye shall give his inheritance unto his brethren. And if he have no brethren, then ye shall give his inheritance unto his father's brethren, and if his father has no brethren, then shall ye give his inheritance unto his kinsman, that is next to him of his family, and he shall possess it: and it shall be unto the children of Israel a statute of judgment, as the Lord commanded Moses." (Numbers, Chap. xxvii, vs. 8—11.) Here, as is justly remarked by Sir William Macnaghten, we find no provision whatever made for the parents, although there are certainly other obvious reasons besides that adduced in the emphatic language of the *Kurán*, why they should not be excluded.

LECTURE II.

Preliminary Remarks.

Accordingly,—a moiety of the deceased's estate devolves on the husband, a fourth on the widow or widows (as the case may be,) a sixth on a single brother or sister by the same mother only, a third on two or more of such brothers and sisters, and a third on the mother if the deceased left no issue of his own or of his son how low soever; but if he (the deceased) left any such issue, then the above portion of the husband is reduced to one-fourth, that of the widow or widows into an eighth, the mother's children are entirely excluded, (they are excluded also by the deceased's father and grandfather,) and the mother's one-third is reduced to one-sixth,—her one-third share is also reduced to one-sixth when the deceased left two brothers and sisters or more by any side whatever;—a moiety devolves on an only daughter, two-thirds devolve on two or more daughters in the event of the deceased leaving no son or sons, but if he left any, then each daughter gets half of what each son is entitled to;—and (in default of the deceased's son and daughter,) a son's only daughter gets a moiety; but when there are two or more son's daughters they collectively get two-thirds in the event of the deceased leaving no son's son; but if he left any such issue, then the son's daughter or daughters get nothing as *a sharer* or *sharers*, but each of them, as a residuary, gets half of what each of such males takes.

The son's daughter or daughters are not, however, totally excluded by a single daughter of the deceased, but are entitled to one-sixth as the remainder of the two-thirds (the highest portion ordained for females to take as sharers). When, however, there exist two or more daughters of the deceased, then (they themselves having taken two-thirds of the estate,) the son's daughter or daughters get nothing,

unless there be with them a male in the equal or in a lower degree; as in that case each of the son's daughters would get one share and the male two shares of the residue. In default of heirs down to a brother, the only sister of the whole blood is entitled to a moiety, two or more of such sisters get two-thirds of the deceased's estate, sisters by the same father only have, in default of full sisters, the same interest as the latter; and where there are but one full sister, and one or more half-sisters by the father, there the half-sister or sisters get only one-sixth, the full sister taking one-half of the deceased's estate. The sisters of both descriptions, as above, are rendered residuaries by their respective brothers, as also by the deceased's own or his son's daughter or daughters. A sixth devolves on the true grandmother or grandmothers in default of the mother. As a sharer, the father gets a sixth, and in the event of the deceased's leaving no son or son's son, but a daughter or daughters with the father, the latter, in addition to his share as above, gets a residuary portion; and on failure of all these, he takes only as a residuary either the whole or a part (as the case may be) of the deceased's estate. As respects his own heritable right, the true grandfather, in default of the father, has the same interest as the latter.

Moreover, it is to be observed,—that, of the above enumerated heirs, the husband, wife, true grandmother, mother, and mother's children are always sharers and never residuaries;—that the father and (in his default) the father's father are only sharers in one case, only residuaries in another, and sharers as well as residuaries in a third (as above stated);—that the deceased's daughter, granddaughter (in the male line), his whole sister and half-sister

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Preliminary remarks.

by the father are sharers when destitute of their own brothers, and, as such, they successively take their legal shares;—that the legal shares of each description of these females are one-half and two-thirds—one-half where there is only one female, and two-thirds when there are two or more (preferably entitled);—that when with an only daughter of the deceased there is a son's daughter or daughters, the former (preferable to the latter) takes one-half, and the latter, only a sixth (as being the remainder of two-thirds, the highest portion allowed to females);—that such is also the case* of a half-sister or sisters (by the father) with a sister of the whole blood;—that the daughter, son's daughter, whole sister, or half-sister by the father, when with a brother or brothers of her own, loses her character as a sharer, and is rendered, by him or them, a residuary, and, as such, she gets a portion amounting to half of what her each brother takes;—that the son's daughter is excluded by two or more daughters of the deceased, but when there is a male in the same degree with her or in a lower degree, she becomes a residuary, and divides between him and herself the remaining one-third in the proportion of two shares for the male and one share for the female;—that the full sister, as well as the half-sister by the same father only, when with a daughter or daughters of the deceased himself or of his son, is made a residuary, and takes the residue remaining after the daughter or daughters (as above) has or have taken her or their legal share or shares;—and that the full sister, when rendered a residuary by the deceased's own daughter, or his son's daughter, excludes not only the half-sister but also the half-brother by the same father.*

* *Vide* Principles, v—xix, and the annotations, &c., relative thereto.

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Order of succession by sharers and residuaries.

In the succession of the father, mother, husband, or wife, there is no grade or consecutive order, they not being excluded in any case; but any or all of them would take the full or reduced share or shares according to the circumstance of the case in which they or any of them may occur with other heirs, either as sharers or as residuaries, or as both. But as regards the rest of the heirs above enumerated, there is this successive order:—The father's father or true grandfather inherits after, that is on the demise of, the father. The mother's mother, or true grandmother,* on the demise of the mother: the father's mother or any other paternal female ancestor on the demise of the father also. The mother's children inherit on failure of the deceased's own children and the children of his son how low soever, also on failure of the deceased's father, and father's father, by all of whom they are excluded. The son's daughter succeeds on failure of the deceased's son, and her proper place is *after* the daughter or daughters of the deceased, though in the case of the latter leaving an only daughter, the son's daughter takes simultaneously with her a sixth part (which together with the half taken by the former constitutes two-thirds). The whole sister inherits *as a sharer* on failure of the deceased's brother, father, children, and son's children how low soever, and *as a residuary* with the deceased's own or his son's daughter, or with her own brother, on failure of the rest as above; and the place of the half-sister by the same father only is just after the whole sister, though in the case of the latter being an only one, the former simultaneously with her takes a sixth,—a moiety being taken by the latter, in whose

* The grandfather and grandmother are merely substitutes for the father and mother.—B. Dig. Introd. p. xlii.

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Preliminary remarks.

default she is made a residuary by deceased's own daughter or his son's daughter, or by her own brother, as the case may be.

Order of succession by residuaries.

The order of succession of the residuaries is also according to the nearness of relationship to the deceased, and not according to their classes (*a*). Thus the deceased's own offspring succeed first, then the offspring of his son how low soever, then the deceased's father, then his true grandfather how high soever, then the offspring of the deceased's father, that is the deceased's brothers, and their sons how low soever, in the successive order; then the offspring of the deceased's true grandfather, that is paternal uncles, and their sons how low soever, in the successive order; then the offspring of the deceased's great-grandfather, that is, father's paternal uncles and their sons how low soever, in the successive order; then the offspring of the deceased's great-great-grandfather, that is, grandfather's paternal uncles, and their sons how low soever, in the successive order; and so on *ad infinitum*,—distinction being always made between the whole and half-blood, and pre-

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(*a*). Where there are several residuaries of different kinds, one a residuary in himself, another a residuary by another, and a third a residuary with another, preference is given to propinquity to the deceased; so that the residuary with another, when nearer to the deceased than the residuary in himself, is the first. Thus, when a person has died, leaving a daughter, a full sister, and the son of a half brother by the father, a half of the inheritance is to the daughter, a half to the sister, and nothing to the brother's son, because the sister becomes a residuary with the daughter, and she is nearer to the deceased than his brother's son. So, also, when there is with the brother's son a paternal uncle, there is nothing to the uncle. And, in like manner, when in the place of the brother's son there is a half-brother by the father, there is nothing for the half-brother.—Fatáwá Alamgírí, Vol. vi, page 629.—B. Dig; 694.

ference given to the former in the case of the relatives being in the equal degree of affinity, otherwise to the nearest of them (*b*).*

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The order of succession as above given, and the inheritability or non-inheritability of the relations in general are regulated and ascertained according to the following general rules: 1—The nearest, *then*, the nearest (*c*).

General Rules.

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(*b*). Thus where claimants happen to be father's paternal uncles of the whole and half-blood, those of the whole-blood will inherit in preference to those of the half-blood; but where the claimants happen to be the deceased's paternal uncle of the half-blood and his father's paternal uncle of the whole-blood, there the deceased's paternal uncle of the half-blood by reason of being nearer will succeed, and the father's paternal uncle, though of the whole-blood, will, by reason of his being more remote, be excluded by the other.

(*c*). For instance, where the deceased left a son, and the son of another son who died before his father (the deceased), there the deceased's surviving son being the nearest will inherit to the exclusion of the fatherless grandson.†

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* Residuaries of this kind are, first, the lineal descendants, or sons and sons' sons how low soever; then the lineal ascendants, or father and father's fathers, how high soever; and, finally, the lineal collaterals and their descendants in the same way, without any apparent limit, the full blood being always preferred to the half; but the half if nearer in degree being preferred to the full when more remote.—B. Dig. Introd. p. xli.

† "The apparently unjust preference of the elder son, to the exclusion of all the rest, which, in our law," says Sir William Macnaghten, "had the origin in the feudal policy of the times, is rejected by the Muhammadan law, and the equitable principle of equality obtains in its stead. The only rule which bears on the face of it any appearance of hardship, is that by which the right of representation is taken away, and which declares that a son, whose father is dead, shall not inherit the estate of his grandfather together with his uncles. It certainly seems to be a harsh rule, and is at variance with the English, the Roman, and Hindú laws. The Muhammadan doctors assign as a reason for denying the right of representation, that a person has not even an inchoate right to the property of his ancestor, until the death of such ancestor, and that, consequently, there can be no claim through a deceased person, in whom no right could by possibility have been vested."—Macn. M. L. Prel. Rema., pp. ii & iii.

The above could only be remedied by gift before the last or fatal illness of the late owner, or partially by a will, as thereby he could bequeath one-third of his property without the consent of his legal heir.

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Preliminary remarks.

2—Whoever is related to the deceased through any person shall not inherit while that person lives (*d*). 3—The strength of consanguinity prevails: the person having two relations is preferable (whether male or female) to him or her who has but one relation (*e*). 4—When the relationship is equal, the male has double the portion of a female."

Principle.

I. There belong to the property of a person deceased four successive duties: *first*, his funeral ceremony and burial without superfluity of expense, yet without deficiency (*f*),*—as the (interment with) *Kafan-us-Sunnat* (*g*), or with the same number of clothes as the deceased wore during life ;†—*next*, the discharge of his debts from the whole of his remaining assets ;—*then* the payment of his legacies, even though the same be indeterminate (*h*); and *then* the distribution of the residue among the successors (*i*): according to the Book (the *Kurán*), to the Traditions, and to the assent of the Learned.‡

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(*d*). Thus a son's son or daughter does not inherit while his or her father is alive, and not excluded for any reason.

(*e*). Surely, kinsmen by the same father and mother shall inherit before the kinsmen by the same father only: thus a brother by the same father and mother is preferred to a brother by the same father only, and a sister by the same father and mother, if she become a residuary with the daughter, is preferred to a brother by the same father only, and the son of a brother by the same father and mother is preferred to the son of the brother by the same father only.—Sirájiyyah, page 18.

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* Sirájiyyah, page 1. † Durr-ul-Mukhtár, page 861.

‡ Sirájiyyah page 2;—Durr-ul-Mukhtár, page 861.

There are different kinds of debts, of which some (in point of payment) are preferable to the rest. See Debts.

(*f.*) The phrase "without superfluity of expense, yet without deficiency," is thus explained by Sharíf:—"This is either in consideration of the number (of clothes), in which case, if a male be shrouded with more than three pieces of cloth, and a female, with more than five, it would be held a prodigal superfluity, and, if with less than those mentioned, a niggardly deficiency of expense;—or in consideration of value, in which case, if, for instance, the deceased, during life, used to wear clothes of the value of ten (*dirms*), and (when dead) he was shrouded with a vesture valued less or greater than that, there would be a niggardly deficiency, or prodigal superfluity. But if the deceased used to wear one sort of apparel on solemn festivals (*íds*), another amongst (*i. e.*, in visiting) his friends, and a third, in his own house, then he is to be shrouded with the second (sort of apparel), the first being too prodigal, the third too parsimonious, the middling, best suited.—Shárifiyyah, page 2.

Should he, however, happen to have been overwhelmed with debts, in which case, the creditors have a right to prevent his heirs from shrouding him with the number of clothes which is called '*Kafan-us-Sunnat*,' they must shroud him with a sufficient (or moderate) number of apparel (*Kafan-ul-Kifáyet*), that is two clothes, (new or washed,) for a man, and three for a woman. If the deceased left no property, then his funeral expenses must be paid by *him*, who would have been compelled (by law) to maintain him when living. If, however, there be no such person who would be compelled to maintain him, or if he also be indigent, then the funeral expenses must be defrayed out of the public treasury (*Bayit-ul-mál*).—Sharífiyah, page 2.

(*g.*) The dress according to the Hadís or the Prophet's custom, is denominated 'Kafan-us-Sunnat,' which, for a man consists of trousers (izár), a shirt, and a covering sheet; and, for a woman an izár, a shirt, a small piece with which her hair is tied, a covering sheet, and a small piece with which the breast is covered.—Durr-ul-Mukhtár, page 129.

If, however, his shroud be destroyed before the decomposition of his (body), then the deceased must again be shrouded out of the whole of his assets.—Durr-ul-Mukhtár, page 861.

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(*h.*) Here according to the Sirájiyyah, legacies should be paid out of a third of what remains after the deceased's debts are paid; while it appears from the Durr-ul-Mukhtár that legacies should be paid out of the whole of the residue. This apparent discrepancy may, however, be thus reconciled: what is laid down in the Sirájiyyah is applicable to the case where the deceased left an heir or heirs. Since in the case of his leaving no heir, the legacies may, according to the Sirájiyyah, as well as the Durr-ul-Mukhtár and other authorities, be paid out of the whole of the assets remaining after payment of debts, or the whole of such residue might be bequeathed by will. This much will be found in the Sirájiyyah itself.*—*Vide* pages 89 & 93.

As to the phrase—"even though the same be indeterminate," contained in the Durr-ul-Mukhtár,—it is the opinion not only of the author of that work, but also of Sharíf, the celebrated commentator of the Sirájiyyah, who is not a less high authority in the matter of inheritance.†

(*i*). "The successors," says the author of the Dur-ul-Mukhtár, "are entitled to (take as) inheritance even if the property consist of (a copy of) the *Kurán*"—Dur-ul-Mukhtár, page 861.

Principle.

General order of succession.

II. The first in order are those persons who are entitled to shares: they are such as have specific shares allotted to them (*j*). 2—After them are (entitled) the‡ residuaries by consanguinity, who are all such as take what remains of the inheritance

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* Then the payment of his legacies, *out of a third of what remains after* his debts are paid.—Sirájiyyah, pages 2 and 3.

Then (the payment of) legacies are preferred, even though the same be indeterminate. This is according to the correct doctrine.—Durr-ul-Mukhtár, page 861.

† The legacies of a Mussulmán, to the prejudice of his heirs, must not exceed a third part of the property left by him, and remaining after the discharge of his debts: over a third of such residue he has absolute power, and his legatee shall receive it immediately, whether a specific thing or certain sum of money, or only a fractional part of his estate, was bequeathed. This is the opinion of Sharíf, though a distinction, which the text by no means implies, has been taken between a determinate and an indeterminate legacy. Note by Sir William Jones, p. 3.

‡ In Arabic the article "*al* (the)" is in its unlimited sense; consequently, it comprehends both the singular and plural number. It is used here in the plural number to import also the singular.—Durr-ul-Mukhtár, page 862.

after the sharers have taken their shares ; and, if there be only residuaries, they take the whole property. 3—Then the residuary for special cause, that is, the manumittor of a slave, and his (or her) *male* residuary heir (*k*). 4—In default of residuaries, the residue remaining after allotment of shares returns or reverts to the sharers by consanguinity (*l*) according to their respective rights (*m*). 5—Then inherit the distant kindred* (*n*). 6—Next (after them takes) the successor by contract (*o*). 7—Next succeeds the person who was acknowledged as a kinsman through another, so as not to prove his consanguinity through such other (person), provided the deceased persisted in that acknowledgment till he died (*p*). 8—Then (takes) the person to whom more than one-third, even the whole, of the property was left by will (*q*). 9—Then, or lastly,

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7. Thus, if the consanguinity be established by confirmation of the person through whom it is asserted to exist, or his acknowledgment be like that of (the deceased) himself, and supported by the evidence of another person, then his consanguinity shall be proved really to exist; and he (the acknowledged) shall have a claim in juxta-position to the (other) heirs of the deceased, even though the deceased should have afterwards retracted (from his acknowledgment). Such is also the case if the person acknowledged be admitted by the acknowledger previous to (his) retraction.—Durr-ul-Mukhtár, p. 862.

8. After these, to the person to whom more than one-third or the whole of the property was left by will.—Durr-ul-Mukhtár, page 862.

9. Then (the property left by the deceased) is to be placed in the Public Treasury, not as a heritage, but as a spoil or gain for (the benefit of Mussulmáns.)†—Durr-ul-Mukhtár, page 862.

* All these will be hereafter shown in full.

† All such escheats to the Sovereign go towards a fund for charitable uses ; and according to the system of Zayid, the son of Thábit, which has been shortly explained in a former publication, that fund, if it be regularly established, is entitled to the whole estate on failure of residuary heirs, without any return to the sharers, and to the entire exclusion of the four last classes ; but this doctrine seems quite exploded.—Note by Sir William Jones, page 5.

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(the property of the deceased goes to) the Bayit-ul-mál or Public Treasury (*r*).

(*j*). In the *Kurán*, in the Traditions of the Prophet, or by the assent of the Learned, as stated by Sarakhsí (who says): "The persons entitled to shares take before the residuaries on the ground of the Prophet's dictum: "Give shares to those who are entitled to the same; and what remains after giving the shares, is for those males who are the (best, *i. e.*, the) nearest (by relation or for special cause).—Sharífiyyah, page 5.

These (*i. e.*, the sharers) are twelve: ten by relation, of whom three are male, and seven female, and two for special cause, (*viz.*,) the husband and wife.—Durr-ul-Mukhtár, page 862.

(*k*). Next (the inheritance goes) to the person who is the enfranchiser of a slave, though the enfranchiser be a female: such person is a residuary for special cause. Then (to) his or her male residuaries; because the *Valá** (the relation or right arising out of emancipation) does not devolve on a woman, except when she herself has manumitted a slave.—Durr-ul-Mukhtár, page 862.

That is, in default of the enfranchiser of a slave they begin with his or her male residuaries. Here the residuaries are restricted to the males, because there shall be hereafter cited (to that effect) a dictum of the Prophet. Sharífiyyah, page 6. (See Residuaries.)

(*l*). "It should not be objected," says Shárif, "that the person who is entitled to a share and not to the residue, must not take the whole (in the event of there being no residuary heir); inasmuch as, he (the sharer) is entitled (to the whole not as residue, but) partly as share and partly as return."—*Ibid.*

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* In a note to his translation of the Hidáyah, Mr. Hamilton observes, that 'there is no single word in our language fully expressive of this term. The shortest definition of it is, 'the relation between the master (or patron) and his freedman.' But even this does not express the whole meaning. Had he proceeded to state "and the relation between two persons who had made a reciprocal testamentary contract," the definition might have been more complete.—Note by Sir William Macnaghten.

(*m*). That is, the proportions of their respective shares are fixed according to their relationship (to the deceased), and the remainder returns to them in accordance therewith.—Sharífiyyah, page 6.

Because their relation subsists even after they had taken their shares: it does not, however, return to those who are entitled to shares for special cause; whence it does not revert to the widower, or widow*—*Ibid.*

(*n*). That is, when the inheritance cannot return or revert owing to the non-existence of the persons entitled to shares by (right of) consanguinity, they begin with the distant kindred, who are neither residuaries nor sharers, but (mere) relatives: the rights of these are postponed to the return made to the persons entitled to shares by right of consanguinity, because the latter are the nearest relatives of the deceased, and, in rank too, superior to the former.† *Ibid.*, page 9.

(*o*). That is, in default of those (already) mentioned, the whole of the inheritance goes to the successor by contract,‡ unless there be a widower or widow, but if one (of them) be found (living), then the residue devolves upon him or her: such is the doctrine laid down in the "Faráiz-i Usmániyah" (a treatise on Inheritance by Usmán).—Sharífiyyah, page 9.

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* The Commentator says:—"It does not return to those who are entitled to shares for special cause, &c., &c." It should, however, be known that it has been laid down by the modern lawyers that 'in default of any other sharer, the residue returns also to the widow or widower.' This much is elsewhere affirmed by the commentator himself on the authority of the Prophet's companion Usmán. See the last paragraph of the body; see also the Section treating of the Return.

But, if there be sharers by consanguinity and no residuaries, a further portion of the inheritance reverts to them, though never to the widower or widow, while any heirs by blood are alive.—Note by Sir William Jones, p. 4.

† On failure of the two preceding classes, the distribution is made among those next of kin, who are neither sharers nor residuaries: they may be called the distant kindred.—*Ibid.*

‡ Should none of the distant kindred be living, and capable of inheriting, the estate goes (unless there be a widow or widower, who is first entitled to a share,) to him, who may be called the successor by contract; and of that succession it is necessary to give an example. If Amar, a man of an unknown descent, says to Zayid: "Thou art my kinsman and shall be my successor after my death, paying for me any fine and ransom to which I may become liable," and Zayid accept the condition, it is a valid contract by the Arabian law; and if Zayid also be a man whose descent is unknown, and make the same proposal to Amar, who likewise accepts it, the contract is mutual and similar, and they are successors by contract reciprocally.—*Ibid.*

LECTURE II.

The description of the successor by contract is this:—"If a person of unknown descent says to another: "Thou art my kinsman and shalt be my successor when I am dead, and thou shalt pay for me any fine and ransom to which I may become liable;" and if the other says: "I accept," then it is a valid contract according to our doctrine. The acceptor shall be the heir, he being the payer of the fine or ransom. If the other person also be one whose descent is unknown, and make the same proposal to the first (mentioned), and if he accept it, then each of them shall be successor (by contract) to the other, and pay for him any fine or ransom to which he may become liable. The person of unknown descent, may, however, retract from the contract so long as the other does not pay the fine or ransom for the contractor.—Sharífiyyah, page 10.

Sháfií, however, says: "No person can be a successor by contract except the master of an enfranchised slave." This doctrine is adopted by Sháfií as well as by Zayid. "But," says Shárif, "the doctrine embraced by us (as already stated) is the same as maintained by Umar, Alí and Ibn-ul-Masúd—*Ibid.*, pp. 9 & 10.

(*p*). This acknowledged kinsman takes after the succession of the successor by contract, and before the person to whom the whole property was left by will. There are, however, certain conditions to be observed: *First*, the acknowledgment of his consanguinity on the part of the acknowledger must import to be such as being through another. For instance, if one acknowledge a person of an unknown pedigree to be his brother, then his acknowledgment (of relation) must import as being through his father, for thereby he becomes his (the father's son).* *Secondly*, this acknowledgment must be such as not to prove his consanguinity through such other (third) person,—as when the father would not admit this consanguinity (*i. e.*, the

* If no such agreement had been made, but if Amar in his lifetime had acknowledged Zayid, a man of an unknown pedigree, to be his brother or his uncle, that is, to be related to him by his father, or by his grandfather, though in truth he had no such relation, and the bare acknowledgment of Amar cannot be admitted as a proof of it, yet if Amar die without retracting his declaration, Zayid is called the acknowledged kinsman by a common ancestor, and stands in the fifth class of successors, but takes the estate before the general devisee.—Note by Sir William Jones, page 4.

unknown person's being his son). *Thirdly*, when the acknowledger should die persisting in his acknowledgment. The result of these conditions or cases are evident.—Sharífiyyah, page 10.

(*q*). That is, when there is none of them who are above mentioned, they begin with the person to whom the whole property was left by will. Thus the bequest shall take effect with him (in his favor): inasmuch as the rule prohibiting against one's bequeathing more than one-third was for the sake of heirs, but if none of them be in existence, then according to us, he (the legatee) is to have the whole of what was left to him by will.—*Ibid.*, p. 10.

The Sirájiyyah speaks of the whole property (and not of any portion thereof) left by the will, leaving others to infer that when he has spoken of the whole, he must be taken to have spoken also of any part thereof, the whole being equal to, and containing, all its parts. Accordingly, its commentator, Sharíf, after citing the passage to that effect, (*viz.* "Then the person to whom the whole property was left by will,") has, in his exposition thereof, expressly stated what was left (in the original) to implication, by saying, "That is, when there is none of them who are above-mentioned, they begin with the person to whom the whole property was left by will. Thus the bequest shall take effect with him (in his favor), inasmuch as the rule prohibiting against one's bequeathing more than one-third was for the sake of heirs; but if none of them be in existence, then according to us, he (the legatee) is to have the whole of what was left to him by will."

(*r*). That is, if there be none of the persons above-mentioned, the property left by the deceased is to be placed in the Public Treasury; because the property is susceptible of being lost; so it is to be (placed therein) for all Mussulmáns. This (deposit), however, is not by way of inheritance, since they (the Mussalmáns) are brethren. Do you not see that when an alien tributary leaves no heir, his property (also) is placed in the Public Treasury, though Mussalmáns are not entitled to the inheritance of infidels; and this also is a proof (of its not being placed there as an inheritance,) that it is equally distributed to the male and female Mussalmáns when a distribution of such property is made; whereas in the (distribution of) inheritance there is no equality between the two sexes.—Sharífiyyah, pp. 10 & 11.

Principle. III. The followers of Sháfií, however, are of opinion that if there be regularity or safety in the Public Treasury, the placing of a deceased's property therein is preferred to its devolution upon the distant kindred, and its return (to the sharers); but if there be no regularity there, it should first revert to those consanguineous relations who are entitled to shares, with reference (or in proportion) to their legal shares; after (that is, on failure of) them, it should devolve on the distant kindred.—Sharífiyyah, page 11.

According to Sháfií.

According to them, the inheritance does not at all devolve on the successor by contract, nor on the person ackowledged as a kinsman; nor on the person to whom the whole property was left by will.—*Ibid.*

Principle. IV. The shares appointed in the *Kurán* are six: a moiety, a quarter, an eighth, two-thirds, one-third, and one-sixth. The persons entitled to these shares are twelve, of whom four are males, *viz.*, the father, the true grandfather (*s*), or an ancestor how high soever (in the direct paternal line), the brother by the same mother only, and the husband; and eight females, who are the wife, the daughter, and the daughter of a son how low soever (*t*), the sister by the same father and mother, the sister by the father's side, and the sister by the mother's side, the mother, and the true grandmother (*u*).—Sirájiyyah, page 7.

Shares and sharers.

(*s*). The true grandfather is a male ancestor related to the deceased without the intervention of the mother or a female ancestor (as the father's father how high soever).—Sirájiyyah, Arabic, page 18.

(*t*). That is, of any male descendant in the direct male line of the deceased.

(*u*). Here the grandmother is restricted to be the true one, and she is defined to be that person who is related to the deceased without the intervention of a false grandfather, that is the male ancestor related to the deceased necessarily by the intervention of the mother (or a female ancestor);

because she is placed in juxta-position with the true grandfather above defined. Thus when a grandmother is related without the intervention of a false grandfather, she is a true one: whether she be related through females only, as the mother's mother, and mother's mother's mother; or through males only, as the father's mother: and the mother of the father's father, or by the intervention of both male and female, as the father's mother's mother: such an ancestress is a sharer amongst the grandmothers, just as a true grandfather is amongst the grandfathers. But when related by the intervention of a false grandfather, she becomes a false grandmother, whether she be related by the intervention of males or females,—as the mother of the mother's father, or the mother of the paternal grandmother's father;—then such an ancestress is not entitled to a share just as a false grandfather is not, but both of them are included in the distant kindred, who inherit by (right of) relation, and not as residuaries or sharers.—Sharífiyyah, page 17.

The persons above enumerated do not all succeed simultaneously, nor are their shares always the same. On the contrary, some of them are, in particular cases, entirely excluded, while others are partially so, their shares being reduced to smaller proportions. See the Section on Exclusion, &c.

Principle.

V. The father inherits in three cases or ways:— *viz.*, [he takes] 1—an absolute share, which is a sixth (unmixed with any residuary portion)* with the deceased's son or grandson how low soever; 2—a legal share as well as a residuary portion, in the case of the deceased leaving a daughter or a daughter of his son how low soever in the degree of descent; and 3—a simple residuary portion, and this on failure of (the deceased's) children and son's children or other descendants how low soever (*v*).†—Sirájiyyah, page 8.

Of a father.

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* Sharífiyyah, page 17.

† As examples of the father's rights, let us suppose Amar to have died worth two thousand four hundred pieces of gold, leaving his father Zayid and either a son or a son's son, Umar: in this case, the four hundred pieces are the share of Zayid, and Umar takes the remaining two thousand; but, if Amar leave only his father Zayid, and either a daughter or son's daughter, Layelá, the father is first entitled to the four hundred pieces, or a sixth part, and after Layelá has received twelve hundred, or a moiety of the estate (which,

LECTURE II.

(*v*). Thus there are three states or conditions appropriate to a father,—as a sharer, he takes a sixth, as a sharer and residuary he takes both a sixth part and a residuary portion, and only as a residuary, he takes the residue of the estate, remaining after the sharers have taken their appropriate shares.

Principle.

VI. In default of the father, the true grandfather has the same interest or right as the father had, except in four cases (*w*).*

Of a grandfather.

ANNOTATIONS.

V & Vi. The father and grandfather take in three cases: 1.—an absolute share, which is a sixth, and this with a son or son's son; 2.—a simple residuary portion on failure of such (issue); and 3.—a legal share and a residuary portion also, with a daughter and son's daughter.—Durr-ul-Mukhtár, page 863.

Vi. The true grandfather has the same interest with the father, except in four cases which will be mentioned presently, if it please God; but the grandfather is excluded by the father, if he be living; since the father is the mean of consanguinity between the grandfather and the deceased.—Sirájiyyah, page 8.

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as we shall see, is her share in this case), he takes, as residuary, the eight hundred pieces which remain; so that the property of Amar is equally divided between them. Should no relation be left but Zayid the father, and Lebid the brother of the deceased, Lebid is excluded; and the whole estate goes to Zayid.

* If, in the three preceding cases, the paternal grandfather Salím had been left instead of Zayid, his rights would have been precisely the same; and the only difference between Zayid and Salím will appear from the four following examples. 1.—The paternal grandmother would be excluded by Zayid her son, but not by his father, her husband Salím. 2.—If Amar or Hindah leave a father Zayid, a mother Salmá, and a widow Zayenab, or widower Hárith, the mother takes a third part of what remains after Zayenab or Hárith has received the legal share, but, if Salím be substituted for Zayid, she would have a right to a third of the whole assets according to the prevailing opinion, although Abú Yusuf thought her entitled, even in that case, to no more than a third of the remainder. 3.—The brothers of the whole blood, and those by the same father only, are excluded from inheritance by Zayid the father, but not by the grandfather Salím, as the best lawyers agree, dissenting on this point from their master Abú Hanífah. 4.—If a mar had manumitted his slave Yásmín, and died, leaving his father Zayid nd a son Umar, a sixth part of the right of succession to Yásmín would have vested, according to Abú Yusuf, in Zayid, but, if the paternal grandfather Salím had been left instead of the father, the whole interest would have vested in the son: in this case the illustrious lawyer ultimately dissented from his master and from his fellow student Muhammad, who were both very justly of opinion, that, whether Zayid or Salím were alive on the death of the manumittor, the whole right of succession to the manumittee vested in Umar.—Commentary by Sir William Jones, page 9.

Because the father is the mean of consanguineous relation between the deceased and the true grandfather;* the latter, therefore, is remoter than the father, and being so, he cannot succeed if the father be living.

(*w*). The four exceptional cases in which the grandfather is not equal to the father are as follows:—

1—The father's mother does not inherit with him, whereas she inherits with the grandfather. 2—If the deceased leave parents, and either of the married couple, then the mother takes one-third after the allotment of the spouse, but if there be a grandfather instead of the father, the mother takes a third of the whole property.† 3—The brothers and sisters by the same father and mother, and by the same father only, are all excluded by the father as is agreed (among the Learned), whereas they are not excluded by the grandfather, except according to Abú Hanífah (with whom, however, the Fatwá concurs).‡ 4—According to Abú Yusuf, the father of a manumittor takes with his son a sixth of the property of the freedman, whereas this is not the case with the grandfather; but the whole right over the freedman's property vests in the son; and according to all (other) Imáms there is no distinction between them (the father and grandfather), for neither of the two takes any thing out of the property of a freedman.—Sharífiyyah, page 18.

Principle.

VII. A single half-brother or sister by the same mother only gets a sixth, and two or more of such half-brothers and sisters get a third, if the deceased left neither his own nor his son's issue, nor a father,

Of Half brothers and sisters.

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* *Sirájiyyah*, page 8.

† The first true grandfather is, of course, the father's father. He is entirely excluded by the father; but if the father be dead, (the grandfather) comes into his place, and his interest in the inheritance is the same with the father, with this difference, however, that being more remote, he is liable to be differently affected by the rights of the mother and paternal grandmother (as above stated).—B. M. L., p. 63.

‡ The true grandfather is entirely excluded by the father; but in default of him he comes into his place, save that he does not, like him, reduce a mother's share to a third of the residue (from a third of the whole); nor entirely exclude a paternal grandmother. He excludes, however, all the brothers and sisters of the deceased, according to Abú Hanífah with whom the Fatwá concurs.—Fatáwá Alamgírí, Vol. vi, p. 625;—B. Dig. pp. 686 & 687.

LECTURE II.

nor a true grandfather, by any of whom they are excluded. And among the children by the same mother only there is no distinction of sex as regards their heritable right and share, both brothers and sisters of the above description having an equal right and an equal share in the distribution.*

Principle.

Of Husband.

VIII. The husband is entitled to a moiety on failure of the deceased's own issue or that of her son how low soever, and to a fourth when there is any such issue (*x*).

(*x*.) The author of the Durr-ul-Mukhtár says:—"A fourth is the share of the husband or husbands; as where two or more men allege to have married the deceased, and adduce proofs; but the deceased did not live in the house

ANNOTATIONS.

vii. One-sixth is (the share) of a single child of the mother, one-third of two or more of the mother's children: (the rights of the) females are the same as (those of) males.—Durr-ul-Mukhtár, page 863.

The mother's children who are brothers and sisters by the same mother only, are excluded by the (deceased's) children and his son's children how low soever, also by the father and grandfather, as the Learned agree; because they are neither children nor parents (of the deceased).—Durr-ul-Mukhtár, page 866.

The mother's children take in three cases: a sixth is the share of one only: a third of two or of more: males and females have an equal division and right.* But they are excluded by the children of the deceased, and by his son's children how low soever, as well as by the father and grandfather, as the Learned agree.—Sirájiyyah, page 8.

viii. The husband takes in two cases: half on failure of children, and son's children how low soever; and a fourth with children or son's children how low soever they descend.—Sirájyyah, page 4.

* A single half-brother, by the same mother only, takes a sixth, and two or more such half-brothers, a third; provided that the deceased left neither children, nor mlae issue of a son, nor a father, nor a true grandfather; by any of whom the brothers by the same mother are excluded; and this article brings us necessarily to one class of female sharers; for, in this instance, there is no distinction of sex, both brothers and sisters by the same mother only having an equal right and an equal share in the distribution.—Commentary by Sir William Jones, p. 9.

of any one of them, and none of them cohabited with her, then (in that case) they will share the portion of one husband by reason of none of them having preference to the other: this (share) is, however, allotted in the case of existence of one of those two, namely, the deceased's issue or her son's issue; a half being the husband's share on failure of those two (descriptions of issue). Thus, there are two cases (of allotments) for the husband,—a half, and a fourth."—Durr-ul-Mukhtár, page 863.

Principle. IX. The wife or wives (as the case may be) of the deceased get a fourth of his estate on failure of his own issue or that of his son how low soever, but an eighth only, if the deceased is survived by any such issue.

Of wives.

Vide Macnaghten's Precedents of Muhammadan Law, Cases lxxvi and xiv, also the *note* in the following page.

Precedents.

COROLLARIES.

1. If there be many widows, they collectively inherit and equally divide among themselves the wife's legal portion, that is one-fourth—if the husband left no issue, and one-eighth—if he left any: they have no pretentions to have more even on the ground of there being a single child and many widows of the late proprietor.—*Vide* East's Notes No. I.

2. In law there is no distinction between a wife married in her maidenhood and that married when widowed or divorced: consequently widows of both descriptions have equal rights to the estate of their deceased husband.

Example. For instance, if a person dies leaving two widows—the one married by the ceremony of Shádí, and the other by that of Nikáh; and by the former three sons and five daughters, and by the latter two sons and one daughter,

ANNOTATIONS.

ix. An eighth should be the share of the wife or wives, if there be issue or son's issue how low soever; and a fourth on failure of such issue.—Durr-ul-Muktár, p. 863.

Wives take in two cases: a fourth (goes) to one or more on failure of children or son's children how low soever, and an eighth with children or son's children in any degree of descent.—Sirájiyyah, page 10.

LECTURE II.

The two widows will collectively receive, and equally divide among themselves, one-eighth of the deceased's estate. *Vide* Macnaghten's Precedents of Muhammadan Law, Case lxv.

Principle.

Of daughters.

X. An only daughter takes a moiety, two or more daughters collectively take two-thirds, of the deceased's estate, in the event of his *leaving* no son or sons; but if he left also a son or sons, then the daughters are no longer *sharers*, but are rendered *residuaries*, and each of them is, in that case, entitled to a portion equal to half of a son's share.*

COROLLARY.

The term '*daughter*,' intending one's own daughter, and not a step-daughter also, the latter is no heir, and has no pretention to claim inheritance.—*Vide* Macnaghten's Precedents of Muhammadan Law, Case xxii.

ANNOTATIONS.

x. The daughters begotten (or brought forth) by the deceased take in three cases: half (goes) to one only, and two-thirds to two or more; and if there be a son, the male has the share of two females, and he makes them residuaries.—Sirájiyyah, page 10.

So whatever may remain after satisfying the share or sharers occurring in the case, the same is to be divided in the proportion of two shares to each brother and one share to each sister.

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* Let us proceed to the shares of the females; and 1—If Amar die without children, and without any issue of a deceased son, his widow Hindah must receive a fourth of his assets; but her share is an eighth only, if any such issue be living: should he leave more widows than one, they take equal parts of such fourth or eighth; so that the legal share of the widower is always in a double ratio to that of the widow or widows: as, if Hindah die worth twenty-four thousand zecchins, her surviving husband Amar must be entitled either to twelve or to six thousand; and if Amar die with the same estate, his widow Hindah must have either six or three thousand for her sole share; or if Zayenab and Abla had also been legally married to Amar, the three widows must receive either two or one thousand zecchins each, as the case may happen. 2—One daughter takes a moiety, and two or more daughters have two-thirds of their father's estate; but if the deceased left a son, the rule, expressed in the *Kurán*, is this: "to one male give the portion of two females;" and the daughters in that case are not properly *sharers*, but *residuary heirs* with the son, their part of the inheritance being always

XI. A son's only daughter takes a moiety, two or more such daughters take two-thirds, of their late grandfather's estate in the event of his leaving no son, nor daughter, nor son's son. But if the deceased left a son, then the son's daughter or daughters are excluded by him; if he left a single daughter of his own, then one-sixth only goes to the son's daughter or daughters; but if he left two or more daughters, then his son's daughter or daughters get nothing, unless there be in an equal degree with, or in a lower degree than, them, a male, by whom they are rendered residuaries, and the residue remaining after the two-thirds of the estate have been taken by the deceased's daughters is divided between this male and the son's daughter or daughters according to the rule "The

Principle.

Of son's daughters.

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in a sub-duple ratio to his part. Thus, if Amar die worth twenty-four thousand pieces of gold, his only child Fátima takes twelve thousand as her share, but, if she have three sisters, Azzá, Latífah, and Zubaedah, two-thirds of the assets, or sixteen thousand pieces, are equally divided between the four girls; and, if there be a son Umar, he must receive, in the first case, sixteen thousand, while Fátima has eight; and in the second, eight thousand, while she and her sisters take each four thousand pieces. 3—If Umar had died before his father, leaving female issue, and his father had then died without any daughter of his own, the daughters of Umar would have had precisely the same shares, to which those of Amar himself would have been entitled, but had Fátima been living, she would have taken half the estate, or twelve thousand pieces of gold, and a sixth only, or four thousand the complement of two-thirds or sixteen thousand, would have been equally distributed among her nieces. Had Fátima and Azzá been at that time alive, they would have taken their legal shares to the exclusion of their brother's female issue, unless the right of that issue had been sustained by a male in an equal or a lower degree, who would have made them residuaries, "the male taking, by the rule, the portion of two females;" but a male in a higher degree would not have given them that advantage; and, if Umar himself had survived, his daughters would have been wholly excluded. The six cases, therefore, or differents ituations, of the female issue of Umar may be thus recapitulated: 1st,—A single female takes a moiety. 2nd,—Two or more have two-thirds. 3rd,—A male in the same, or a lower, degree than themselves, gives them a residuary right in a sub-duple ratio to his own. 4th,—With a daughter of Amar, who is entitled to half, they would have only a sixth, to make up the regular share of the female issue. 5th,—They are excluded, if Amar left more daughters than one, but no male issue in any equal or a lower degree. 6th,—A son also of Amar wholly excludes them. In the first three cases, their legal claims correspond with those of daughters; but in the last three their rights are weaker, because they are in a remoter degree from the deceased.—Illustration by Sir William Jones, *vide* Sirájiyyah, page 10.

LECTURE II.

male has double the portion of a female." If, however, the deceased left neither a son nor daughter, but only his son's son and daughter, then the whole of his estate will be taken by them—the grandson taking two shares and the granddaughter one share in accordance with the above rule (*y*).* .

(*y*). If a man leave three son's daughters, some of them in lower degrees than others, and three daughters of the

ANNOTATIONS.

xi. The son's daughters are like the daughters begotten by the deceased; and they may be in six cases: half (goes) to one only, and two-thirds to two or more, on failure of daughters begotten by the deceased; with a single daughter of the deceased, they have a sixth completing (with the daughter's half) two-thirds; but, with two daughters of the deceased, they have no share of the inheritance, unless there be, in an equal degree with, or in a lower degree than, them, a boy,† who makes them residuaries. As to the remainder between them, the male has the portion of two females; and all of the son's daughters are excluded by the son himself.—Sirájiyyah, page 10.

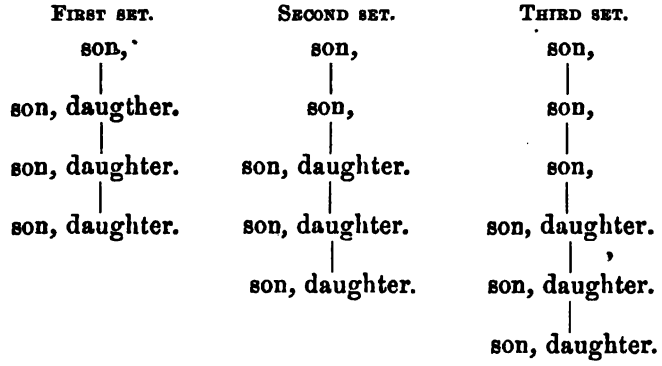
A sixth is the share of the son's daughter or daughters with a single daughter begotten (or brought forth) by the deceased, completing, (with the daughter's half) two-thirds.—Durr-ul-Mukhtár, page 863.

If a person leave three son's daughters, some of them lower in degree than others, and three daughters of the son of another son of the same

* When there is a son, the children of a son take nothing; when there is one daughter, she takes a half, and the son's daughters have a sixth; and if there are two daughters, they take two-thirds, and there is nothing for the son's daughters. That is, when there is no male among the children of a son; but if there is a male he makes the females (whether his sisters or cousins) residuaries with him; so that if there were two daughters or more of the loins, they would have two-thirds between them, and the remainder would pass to the children of the son, in the proportion of two parts to each male and one part to each female. Though the male were in a grade below them, he would make them residuaries with him; so that the remainder would be between him and them in the same proportion, or two parts to each male, and one to each female. Thus, if there were two daughters, a son's daughter, the daughter of a son's son, and the son of a son's son, the daughters would take two-thirds, and the remainder be between the son's daughter and all below her, in the proportion of two parts to the male, and one part to each female. The principle in this case is, that a son's daughter becomes a residuary with a son's son, whether he is in the same or a lower grade with herself, when she is not a sharer.—Fatáwá Aalamgírí, vol. vi, p. 625;—B. Dig., pp. 687 and 688.

† Here the Arabic word rendered by 'boy' is 'Ghulám' by which is here meant a brother, or paternal uncle's son, or the son of either of them.

son of another son, some of them in lower degrees than others, and three daughters of the son's son of another son, some of them in lower degrees than others, as in the following table, which is called the case of *tashbíb*:— LECTURE II.



Here the eldest of the first line has none equal in degree with her; (because she is related to the deceased by the intervention of one person, and none of those other daughters is so);* the middle one of the first set is equalled in degree by the eldest of the second, (by reason of both of them being related to the deceased by the intervention of two persons);* and the youngest of the first set is equalled by the middle one of the second, and by the eldest of the third set (since every one of them is related to the

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description as above, and three daughters of the son's son of another son of the above description, as in this table.—Durr-ul-Mukhtár, page 867. (The table here alluded to is the same as the case of *Tashbíb* above given).

Here the eldest in the first set has none equal in degree with her, consequently a moiety is her portion, and the middle one of the first set is equalled in degree by the eldest of the second, they, therefore, have a sixth to make up two-thirds; and those in lower degrees take nothing unless there be a son with any one of them, who makes her a residuary as well as *her* who is equal to him in degree, and also *her* who is above him, but not entitled to a share: those below him are excluded.—*Ibid.*

* *Sharífiyyah*, page 24.

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deceased by the intervention of three persons);* the youngest of the second set is equalled by the middle one of the third set (by reason of every one of them being related to the deceased by the intervention of four persons);* and the youngest of the third set has no equal in degree; (because she is related to the deceased by the intervention of five persons, whereas none of the other daughters is so.)*—Sirájiyyah, page 12.

"When thou hast comprehended this," says the author of the Sirájiyyah, "then we say, the eldest of the first set has a moiety, (for she stands in the place of the deceased's own daughter,)* the middle one of the first set has a sixth together with her equal in degree, (namely, the first of the second set,)* to make up two-thirds;† and those in lower degrees,‡ never take any thing unless there be a son with them, who makes them residuaries, both *her* who is equal to him in degree, and *her* who is above him, but not en-

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* Sharífiyyah, page 24.

We may truly say, that it is very perspicuous, and that no comment, after what has been premised, could render it clearer. An example, however, will show more distinctly than an abstract rule, in what manner an estate is divisible, when a male descendant gives a residuary title to a female in the same, or in a higher, degree. Call the only surviving male descendant 'Umar,' and suppose him to be the brother of Amína, who stands lowest in the first set of females: here the highest female in that set must receive a moiety of the assets; the next below her takes a sixth together with the highest of the second set, as the complement of two-thirds; and the residue is divided into five portions, of which Umar claims two, and each of the females in the same degree, one; but the three females below them are excluded. If Umar be the brother of Zarífah, whom we suppose the lowest of the middle set, the remaining third of the estate must be distributed in sevenths, because there are five females, three in a higher, and two in an equal, degree with Umar, who must always have a double portion; and, if he be the brother of Unaeza, the lowest female of the third set, (who, on the former supposition, would have been excluded,) there will be six female residuaries entitled to portions with Umar, but in a sub-duple ratio; so that, if Amar died worth twenty-four thousand ducats, the daughter of his son takes twelve thousand of them; the two daughters of his son's sons receive each two thousand, and the residue being eight, Umar is entitled also to two thousand ducats, while Unaeza and the five women, who remain, have each one thousand, which they owe to the fortunate existence of Umar.—Illustration by Sir William Jones, *vide* Sirájiyyah, page 12.

† "To make up two-thirds."—It is so, because when the eldest in the first set stood in the place of a begotten daughter, then those who are below her in one degree stand in the place of son's daughters.—Sharífiyyah, page 24.

‡ They are the remaining six of the nine daughters; because when full two-thirds go to those three, then there remains no portion for the remaining daughters, nor could they become residuaries: consequently, they have no share whatever in the inheritance.—*Ibid*, p. 24.

titled to a share: those below him* are excluded— Sirájiy-yah, page 13. LECTURE II.

XII. In default of the father, and grandfather of the late owner, as well as his own and son's children, the only sister of the whole blood takes a moiety, two or more full sisters collectively take two-thirds of his estate; but if there exist a full brother or brothers, then their existence renders the sister or sisters residuaries, and each of them, in that case, gets a portion amounting to half of what is succeeded *Principle.* Of Sisters.

* "Those below him:" that is, those who are in a degree lower than that of the boy. Thus, if there be a boy with the lowest of the first set, then the eldest of the first set would take half, and the middlemost of the first with the eldest of the second set would take a sixth, and the remaining third would be (divided) amongst the boy, and the lowest of the first set, the middlemost of the second set, and the eldest of the third set, five shares being made, and the male having the portion of two females: the lowest of the second set, and the middlemost and last of the third set are excluded. And if there be a boy with the lowest of the second set, the remaining sixth would be (divided) between him and the lowest of the first set, the middlemost or second and the lowest of the second set, and the eldest and the middlemost of the third set, into seven parts, of which the male would have the portion of two females, and the lowest of the third set would be excluded. And if there be a boy with the lowest of the third set, the remaining sixth would be (divided) between the boy, and the six females (lower than the eldest and middlemost of the first set, and the eldest of the second set), into eight parts. This is what has been laid down in the text book.—Sharífiyyah, page 24.

But if there be a boy (in an equal degree) with the eldest of the first set, then the whole of the heritage would be divided between him and his sister, the male having the portion of two females; and the eight females below (them) will have nothing. But if (a boy) be supposed to exist (in an equal degree) with the middlemost female of the first set, then the eldest of the first set shall have half, and the remainder shall be for the boy and those who stand in an equal degree with him (namely, the middlemost of the first set, and the eldest of the second set), the male having the portion of two females: such is also the case, if there be a boy with the eldest of the second set. And be it known, that if the eldest and elder females from amongst the sons' daughters, in any degree whatever, take two-thirds as sharers; and if there be males mixed with females, then, according to the general doctrine of the Prophet's companions, the males make the females residuaries as (above) mentioned. And if the eldest of the females take half, and there exist males with females, and if, in that case, the number of the males be greater than that of the females, or equal, then the remainder will be (divided) amongst them, each male having the portion of two females. Such is the unanimous assent (of the Learned). And if the number of the females be greater, then also the same is the case according to the doctrine generally agreed to.—Sharífiyyah, page 25.

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to by each brother (*z*): the sister or sisters become also residuaries if the deceased left his own or his son's daughter or daughters; and in this case and state, the sister or sisters get no portion as *sharers*, but take as *residuaries* the residue remaining after the daughter or daughters have taken her or their legal share or shares.*

Example.

(*z*). Thus if a person left one brother and one sister, the assets left will be divided into three shares, two of which will go to the brother and one to the sister; but if he left two brothers and three sisters, then the assets would be divided into seven shares, four of which would go to the

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xii. Sisters by the same father and mother may be in five cases: half goes to one alone; two-thirds to two or more; and if there be brothers by the same father and mother, the male has the portion of two females; and the females become residuaries through them by reason of their equality in the degree of relationship to the deceased; and they take the residue, when they are with daughters, or with son's daughters, by the saying of him, on whom be blessing and peace! "Make sisters with daughters (*b*), residuaries."—Sirájiyyah, p. 7.

(*b*). Here the two plural terms (*i. e.*, sisters and daughters) are in their unlimited sense, importing one as well as many.—Sharifiyyah, page 41.

Thus a single sister also is rendered a residuary by one as well as many daughters of the late owner or of his son.

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* Where there are daughters or son's daughters, and no brothers, the sisters take what remains after the daughters and son's daughters have realized their shares; such residue being half should there be only one daughter or son's daughter, and one-third should there be two or more.—Macn. Prec. M. L. Prin., 25.

There are five conditions in which full sisters may be found. Three of these occur, when there are neither children nor children of a son how low soever; one full sister being entitled to a half of the property in that predicament, and two or more of them to two-thirds; while they lose their character of sharers when there are full brothers, whose existence renders them residuaries, the portion of each female then becoming half the portion of a male. In all the preceding cases, however, the share of the sisters is liable to be intercepted by a father, or true grandfather; by whom they are absolutely excluded, as well as by a son or son's son how low soever.—B. M. L., p. 67.

brothers (two to each), and three to the three sisters—one to each. LECTURE II.

Vide Precedents of Muhammadan Law, cases lxx and xxxiv, also Sudder Dewanny Adawlut Decisions for 1861, page 61. *Precedents.*

XIII. The only sister by the father's side takes a half, two or more of such sisters take two-thirds, of the deceased's property, on failure of the persons above mentioned, as well as on failure of sisters of the whole blood. But if there exist one only whole sister, the half sister or sisters (as above), inheriting with her, will get only a sixth as the complement of two-thirds (ordained for sisters in general); the latter, however, can have no portion of the inheritance with two or more sisters by the same father and mother, unless there be with them (the half-sisters) a half-brother or brothers of the same description who would make them *residuaries*, and then the residue would be divided among them in the ratio of two parts to a male and one to a female. The half-sisters as above become residuaries also with the deceased's own or his son's daughter or daughters (if any), and, in that case and predicament, the half-sisters take the residue remaining after the daughter or daughters have taken her or their legal portion. *Principle.* Of half sisters.

Vide Sudder Dewanny Adawlut Decisions for 1848, page 160. *Precedents.*

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xiii. Sisters by the same father only are like sisters by the same father and mother, and may be in seven cases: half (goes) to one, two-thirds (go) to two or more on failure of sisters by the same father and mother; and, with a sister by the same father and mother, they have a sixth, as the complement of two-thirds; but they have no inheritance

Principle. XIV. Brothers and sisters by the same father and mother, and those by the same father only, are all excluded by the son and son's son in how low a degree soever, also by the father as it is agreed (among the Learned); and even by the paternal grandfather according to Abú Hanífah,* upon whose opinion (in this point) decision is given (*a*).—See the Chapter on Exclusion.

Brothers and sisters excluded.

(*a*). Although the two disciples, Abú Yusuf and Muhammad, do not agree with their master Abú Hanífah in holding that the paternal grandfather should, like the father, exclude the above-mentioned relatives, yet the opinion of Abú Hanífah is held to be the settled law. This is manifest from the following passages of the Durr-ul-Mukhtár and Fatáwá A'lamgírí.

"The children of the whole blood, that is, the brothers and sisters by the same father and mother, are excluded by three persons, (namely) the son and son's son how low soever, and by the father as it is agreed (among the Learned), and, according to Abú Hanífah, even by the paternal grandfather. But the two disciples say, "the heritage must be divided according to the principle laid down by

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with two sisters by the same father and mother,†—unless there be with them a brother by the same father, who makes them residuaries; and then the residue is (distributed) among them by the rule—"to the male (goes) what is equal to the share of two females." The seventh case is, that they are residuaries with daughters, or with son's daughters for the reason which we have (before) stated.‡—Sirájiyyah, page 7.

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* Sirájiyyah, page 14.

† Because, when the full portion of sisters, that is two-thirds, is wholly taken by and them, and there remains nothing for the sister or sisters by the same father only.—Sharíflyyah, page 27.

‡ Because the heritable right of the brothers and sisters by the same father and mother is established like that of the begotten children, and the heritable right of the brothers and sisters by the same father only is established to be like that of the son's children, males inheriting according to (the rights of) males, and females, according to (the rights of) females.—Sharífyyah, page 27.

Zayid." The former (opinion), however, is the law.—Durr-ul-Mukhtár, page 866.

All brothers and sisters are excluded by a son, or son's son how low soever, or a father by general agreement, and also by a grandfather according to Abú Hanífah. And the children of the father (that is, half brothers and sisters on his side), are excluded not only by these, but also by a full brother; and the children of the mother (or half brothers and sisters on her side) are excluded by a child, though a daughter, or by the child of a son, a father, and grandfather by general agreement.—Fatáwá A'lamgírí, vol. vi., p. 629;—B. Dig., p. 689.

Principle.

XV. The brothers and sisters by the same father only are excluded also by brothers of the whole blood, and likewise by the sister of the whole blood when she is rendered a residuary by a daughter or son's daughter (*b*).*

Half brothers and sisters excluded.

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xv. As son's children are excluded by the son, so are the children of the same father only excluded by the brother of the whole blood.—Sharífiyah, page 28.

The children of the half-blood, that is, the brothers and sisters by the same father only, are excluded by them also, namely, by brothers of the whole blood, as well as by those, that is, by the son, son's son, father and true grandfather.—Durr-ul-Mukhtár, page 866.

They (*i. e.* relations) are preferred according to the strength of consanguinity; thus, from amongst the residuaries, the person who is related by both parents, even if such person be a female, as the whole sister with a daughter, is preferable to the brother by the same father only.—Durr-ul-Mukhtár, page 866.

The deceased's whole sister is rendered a residuary by his daughter or by the daughter of his son, how low soever.—See *ante*, pp. 105 & 106.

A brother by the same father and mother is preferred to a brother by the same father only; and a sister by the same father and mother, if she become a residuary with the daughter, is preferred to a brother by the same father only.—Sirájiyyah, page 18.

* *Vide* Residuaries with others, Sirájiyyah, pp. 13, 14, and 19, also Durr-ul-Mukhtár, page 866.

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(*b*). The residuary with another is every female who becomes a residuary with another female; as full sisters or half sisters by the same father who become residuaries with (the deceased's) daughters or sons's daughters.* Thus, there being a daughter, a full sister, and a brother or brothers by the same father only of the late owner, half goes to the daughter, and half to the sister, and nothing to the brother or brothers; because when the sister becomes a residuary, she is in the place of a full brother.—Fatáwá A'lamgírí, vol. vi., p. 629;—B. Dig., p. 693.

Principle. Of Mother.

XVI. The mother takes in three cases: 1—a sixth when there is a child or son's child even in the lowest degree, or when there are two or more brothers and sisters by whichever side they may be related; 2—a third of the whole on failure of those just mentioned; and 3—a third of the residue after (allotment of) the share of the husband or wife, in the case of either of them existing with both parents (*c*). But she takes a third of the whole in the case of there being a grandfather.†

Precedents. *Vide* Sel. S. D. A. R., Vol. V, p. 296, and Macnaghten's Precedents of Muhammadan Law, Cases lxx, lxxi & lxxvi.

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xvi. The mother takes in three cases:—a sixth with one of them (that is, children or sons's children, even in the lowest degree), or with two or more brothers and sisters by whichever side they are related, even though they be of whole or half-blood mixed; and a third on failure of him or her with whom she would take a sixth.—Durr-ul-Mukhtár, page 863.

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* Of the above passages, only thus far is translated by Mr. Baillie; and it is to be regretted that he has omitted to render the latter part which at once clears up the point.

† Sirájiyyah, page 14.

The share of a mother is a sixth when there is a child living, or the child of a son how low soever, or two or more of the brothers and sisters, whether of the whole or half-blood. And in all other cases, with only two exceptions, her share is a third. The exceptions are when the deceased has left a husband, or wife, and both parents. In these circumstances the husband being entitled to a half, and the wife to a fourth; if the mother received a third, there would remain no more than a sixth for the father in the one case, and five-twelfths in the other, while they generally require that the share of

Because the Almighty has said: "And the parents of the deceased shall have each of them a sixth part of what he shall leave, if he have a *walad* (child)." Here the word '*walad*' signifies both male and female; for there is no context or reason for restricting it to one of the genders.—Sharífyah, page 28. LECTURE II.

(*c.*) A third case is, when there is a husband or a wife, and both parents, and then the mother has a third of what remains, after deducting the share of the husband or wife, and the residue is to the father according to all opinions. But if in the place of the father, there were a grandfather, the mother would have a third of the whole property for her share.—Fatáwá A'lamgírí, Vol. VI, page 629;—B. Dig., p. 688.

COROLLARY.

By 'mother,' however, must be understood the deceased's own mother who bore him, and not a step-mother, who, in law, is considered not a mother, but father's wife; she therefore cannot have the maternal share of inheritance, which is a right appertaining to the genitrix alone.

As a step-mother is not viewed in the same light as a mother, she cannot take the maternal share of inheritance, which is a right appertaining to the mother alone.—Macn. Prec. M. L., Case xxi.

XVIII. A sixth is the share of the (true) grandmother.—If there be many ancestresses, they share the same (one-sixth) provided they be true grandmothers (and equal in degree); since the false *Principle.* Grandmothers.

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a male shall be double that of a female when they succeed together. To avoid this inconsistency, the share of the mother is reduced to one-third of the remainder, after deducting the portion of the husband or wife; by which means the proper ratio is preserved between the shares of the father and mother; for the former being in this case the residuary, will take the remaining two-thirds, or exactly double the portion of the latter.—B. M. L., pp. 63 and 64.

Where there are no children, nor son's children, and only one brother or sister, the mother will take one-third with a widower or widow, if she have a grandfather to share with instead of a father; but a third of the remainder only, after the shares of the widow or widower have been satisfied, if there be a father to share with her.—Macn. M. L., Chap. I., Princ., 34.

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grandmother is (not among the sharers, but) among distant kindred (*e*).*—Durr-ul-Mukhtár, page 863.

Illustration. (*e*) "There is a tradition," says *Sharíf*, "that the paternal grandmother (of a deceased) went to Umar, and said: 'my claim to the deceased's property is superior to the mother's mother; because if she dies, her grandson does not inherit, whereas if I die, my grandson *would* inherit. But he (Umar) said: 'Take this sixth, and if both of you are living, still the same (must be divided) between you; and if there is but *one* of you two, the same (sixth) is for her.' Thus he ordered it (*i. e.*, one-sixth part) to be divided between them two. Consequently, it is agreed (by the Learned) that the true grandmothers equal in degree must equally share one-sixth part amongst them."—Sharífiyyah, page 32.

Principle. XIX. But all of them (whether by the father or mother) are excluded by the mother; and paternal female ancestors are excluded also by the father, and by the grandfather too, except the father's mother

Grandmothers excluded.

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xviii. The grandmother has a sixth—whether she be by the father, or by the mother, whether alone or with more, if they be true grandmothers, and in equal degree.—Sirájiyyah, page 15.

xix. But the true grandmothers in general,—be they by the father, or by the mother,—are excluded by the mother; and the paternal female ancestors are excluded by the father, and, in like manner, by the grandfather also, except the father's mother, even in the highest degree, who inherits with the grandfather, since she is not related through him, but is his wife, so they are like father and mother.—Durr-ul-Mukhtár, page 866.

* The true grandmother is any lineal female ancestor in whose line of relationship to the deceased a false grandfather does not enter; and a false grandfather is a lineal male ancestor between whom and the deceased a female is interposed. Thus in the first degree the mothers of both parents are necessarily true grandmothers, and in the second degree, there are three true grandmothers, *viz.*, the father's grandmothers on both sides, and the mother's maternal grandmother, her paternal grandfather being excluded by the interposition of her father, who is obviously a false grandfather. The share of a true grandmother is a sixth, which, if there be more than one of them in the same degree, is divided between them equally.—B. M. L., p. 65. See *ante*, page 95.

(even in the highest degree) who not being related through the grandfather, takes with him (*f*).*— Sirájiyyah, page 15. LECTURE II.

(*f*.) That is, her relation to the deceased is not through the grandfather, but being his wife, she is not excluded by him, but she inherits with him, as does the mother with the father. This (exclusion) takes place where the grandfather is distant by one degree, but where he is distant by two degrees, as the father of the father's father, there the two female paternal ancestors inherit with him (namely), the father's father's mother who is the wife of the grandfather (aforesaid), and the father's mother's mother's mother who is the mother of the wife of the father's father, as in the following illustration†:—

$$6 \times 2 = 12.$$

Illustration.

Father's father's mother ... 1	Father's mother's mother ... 1	Father's father's father ... 10.†

XX. As the degrees of the paternal grandfather increase, so does the number of the grandmothers on the father's side, who inherit with him, increase. Thus where the grandfather is distant from the deceased by three degrees, there the grandmothers on the father's side (who are equal in degree) succeed with him, as in the following table‡:— *Principle.*

$$6 \times 3 = 18.$$

Father's father's father's father—15.	Father's father's father's mother—1.
Father's father's mother's mother—1.	Father's mother's mother's mother—1.‡

* True grandmothers of any description are excluded by the existence of the mother; those on her own side for two reasons; first, because they are connected with the deceased through her, and, second, because they have but one common cause of succession, namely, maternity. She excludes paternal grandmothers for the latter reason only. These are also excluded by the existence of the father, or the paternal grandfather; but the maternal grandmothers are not excluded by them.—B. M. L., p. 66.

† Sharífiyyah, page 34.

‡ *Vide* Sharífiyyah, page 34.

Principle. XXI. The nearest grandmother or female ancestor on either side (that is whether she be on the mother's or on the father's side) excludes the distant grandmother on whichever side she be, (no matter) whether the nearest grandmother be entitled to a share of the inheritance or be herself excluded (*g*).* *Vide* Sirájiyyah, 15.

Illustration. (*g.*) As the father's mother is excluded by the father then living, and notwithstanding that, she would exclude the mother of the mother's mother; so in this instance, (that is, in the case of the deceased leaving a father, a father's mother, and the mother of the mother's mother,) the whole of the property will, according to our doctrine, devolve on the father, because the distant (grandmother) is excluded by the nearer; and the nearer is excluded by the father; as, for example, sisters of the deceased reduce the mother's share from a third to a sixth, although they themselves are excluded by the mother.—Sharífiyyah, page 35.

Principle. XXII. When a grandmother has but one relation, as the father's mother's mother, and another has two such relations, or more (*h*), as the mother's mother's mother, who is also the father's father's mother (*i*), then a sixth is divided between them in moieties according to Abú Yusuf, regard being had to their persons, but according to Muhammad (it is divided) in thirds, regard being had to the sides.† Of these opinions, the former, which is according to that of Abú Hanífah, Málik, and Sháfií is held to be the law, as is manifest from the subjoined passages.

Illustration. If they (the grandmothers) are two in number, and one of them has but one relation, as the father's mother's mother, and the other has two or more relations, as the mother's mother's mother, who is also the father's father's

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* Durr-ul-Mukhtár, page 866.

† Among the grandmothers, the more remote are excluded by the nearer, even though she be incapable of taking any part of the inheritance. Thus the paternal grandmother is excluded by the father, but she nevertheless is capable of excluding the mother of the mother's mother, though the latter would, as already noticed, be excluded by the father himself.—B. M. L., page 66.

mother,—in such case, Muhammad divides a sixth part between them, in thirds, regard being had to the sides, while the other two lawyers, namely, Abú Hanífah, and Abú Yusuf (divide it) in moieties, regard being had to the persons (of the grandmothers). Sháfií and Málik are of this (latter) opinion. The same is laid down also in the *Kanz* as being decidedly the law: the dictum of this authority is that—'there is no difference, a person having two relations, is (held) as having one relation.'—Durr-ul-Mukhtár, page 866. LECTURE II.

(*h.*) According to this table:—

(*i.*) The case of more than two relations is thus illustrated:—"If the woman who (as above) married her son's son with her daughter's daughter, and a son was born to them, and this son is married to the daughter of her mother's daughter's daughter, and a son is born to them, the said woman is related to the last born as the mother of his mother's mother's mother, also as the mother of his father's mother's mother, and also as the mother of (his) father's father's father; and the other woman, that is the mother of the last mentioned woman's son's wife, is related to the last born son as the mother of (his) father's father's mother.—Sharífiyyah, page 37. Further illustrations.

If there be a grandmother having three relations, and another having one relation, then, according to Abú Yusuf, the one-sixth part should be divided between them in moieties; but according to Muhammad in four parts. Imám Sarakhsí says: "there is no tradition from Abú Hanífah in (regard to) the case of one of the grandmother's having several relations. It is, however, mentioned in the Book of Inheritance by Hasan, the son of Abd-ur-Rahmán, the son of Abd-ur-Razzák Sháshí, one of the companions of Sháfií, that the doctrine of Abú Hanífah, Málik and Sháfií is the same as that of Abú Yusuf.—Sharífiyyah, page 38.

* Sirájiyyah, page 15.

LECTURE II.

Residuaries defined.

THE term '*asabat*' or '*asabah*,'*—which signifies a nerve, tendon, ligament, (whence) connections, relations and kindred,—is, in law, applied to those relations, who inherit the residue of a deceased person's assets which remain after giving the fixed portions of such sharers as do not become residuaries.† Properly speaking, the residuaries are the principal heirs, commencing, in the descending line, from the deceased's own children, and the children of his son how low soever, and, in the ascending line, from the father and true grandfather how high soever, and their children. In default of a simple sharer or sharers (as the case may be), the residuaries take the whole of the deceased's property.

The term '*asabah*' was first rendered simply "heirs" by Sir William Jones in his translation of the Baghyat-ul-Bahis,‡ but he afterwards substituted for it the word 'residuaries' in his translation of the Sirájiyyah, perhaps because such heirs succeeded to the residue. Sir William Macnaghten and other writers also have adopted or used the same term (residuaries) for 'asabah.' As I could not venture to depart from those learned writers in using for 'asabah' an expression other than that adopted by them, the reader, therefore, should understand by the term 'residuaries,' the principal heirs who take not only the residue remaining after giving to the sharers their fixed portions, but also the whole of the deceased's assets on failure of a simple sharer or sharers.

The residuaries are principally of two kinds: (*viz.*) 1—Residuaries by consanguinity, and 2—Residuaries for special cause.

Principle.

XXIII. The residuaries by consanguinity are divided into three classes. Residuaries in their own right or by themselves,—residuaries in another's

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* The final '*t*' of Arabic nouns, rather verbal nouns, is generally changed into 'h,'—as 'Hijrat' (forsaken) is changed into 'Hijrah' the era of Muhammad counted from the day of his leaving Mecca and retiring to Medina.

† The sharers who do not become residuaries are the husband, wife, mother, true grandmother and mother's children, of whom the latter two are in certain cases excluded.

‡ *Vide* Introductory Lecture, page 58.

right,—and residuaries together with another.— Sirájiyyah, page 17.

XXIV. The residuary by himself, or in his own right, is every male (*j*) in whose line of relationship to the deceased no female enters (*k*):* such residuaries principally are of three classes:-(*viz.*,) descendants, ascendants, and collaterals. Residuary in his own right.

(*j*.) The author of the Sirájiyyah recognizes the male sex, because a female cannot be a residuary in her own right, but in another's right, or together with another.—Sharífiyyah, page 38.

(*k*.) Because he, in whose line of relationship a female enters, is not a residuary,—as the mother's children who are sharers, and mother's father, and daughter's son, who are distant kindred, and not residuaries.—*Ibid.* *Again,*—

XXV. The residuaries in their own right are of four classes: 1—The offspring (literally part)

ANNOTATIONS.

xxiv. The residuary in his own right intends every male in whose line of relationship to the deceased no female enters: if a female does enter, the male is no longer a residuary,—as the mother's son (that is, the brother by the same mother only) is not a residuary, but a sharer; likewise, the mother's father and daughter's son, who are (Zaví-ul-arhám) distant kindred (and not residuaries).*—Durr-ul-Mukhtár, page 864.

xxv. The residuaries in their own right are of four classes: 1—the offspring of the deceased; 2—then his root; 3—then the offspring of his father; and 4—then the offspring of his grandfather.—Durr-ul-Mukhtár, page 864.

The residuary by himself or in his own right is defined to be 'every male in whose line of relation to the deceased no female enters;' and such residuaries are of four sorts: 1—the offspring of the deceased; 2—his root; 3—the offspring of his father; and 4—the offspring of his grandfather.—Fatáwá Alamgírí, Vol. VI, page 628;—B. Dig., p. 691.

And they (the residuaries in their own right) are of four classes: 1—the offspring of the deceased; 2—his root; and 3—the offspring

* *Vide* Sirájiyyah, page 18.

LECTURE II. of the deceased ; 2—his root ;* 3—the offspring of his father ; and 4—the offspring of his grandfather how high soever.†

ANNOTATIONS.

of his father ; and 4—the offspring of his grandfather.—Sirájiyyah Arabic, page 38.

The above is a *verbatim* translation of its original which runs thus: "*Wa hum árbátu asnáfin : juz-ul-mayyiti wa aslu-hu, wa juzu abíhi, wa juzu jiddi-hi.*"

This reading of the passage is to be found in all the editions of the Sirájiyyah, except in that made by Sir William Jones, in which the first two words of the passage are "*Wa hiyá* (and this)" instead of "*Wahum* (and they)" as in the above reading. This, however, is of no importance; but the translation of the above passage made by him, which, limiting the collateral residuaries to be the offspring of the nearest grandfather, at once excludes the descendants of the grandfathers higher than the nearest, though their heritable right, as residuaries, is universally recognised. The translation in question runs thus :—"And of this sort there are four classes : the offspring of the deceased and his root ; and the offspring of his father, and of his *nearest* grandfather." (Sirájiyyah, page 10.)

Now, in the original, the term 'grandfather' has no such epithet as 'the nearest,' and not being qualified by this adjective, it does not (as it otherwise does) exclude the offspring of any true grandfather how high soever. Add to this, when at the end of the same paragraph the author (of the Sirájiyyah) has asserted that 'the rule is the same in regard to the paternal uncles of the deceased, and, after them, to the paternal uncles of his father, and, after them, to the *paternal uncles of his grandfather*,' then according to the Sirájiyyah the descendants of the lineal ancestors (at least) up to the great-great-grandfather are residuaries, and, as such, heirs at law. Very likely, the learned Translator has taken the first of the two phrases "*Al-ákrabu, fal-ákrabu* (the nearest, *then*, the nearest)," which follow the term 'grandfather,' but form a sentence different from that which ends with the word 'grandfather,' (the finite verb 'succeeds' or 'inherits' being understood as is the case with many Asiatic languages including

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* By a Metaphor the deceased is considered to be a tree of which his descendants are the branches, and the ascendants the roots.

† *Vide* Sirájiyyah, page 18.

XXVI. Of the residuaries, the nearest succeeds first, *then* the nearest after him.* GENERAL RULE.

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Arabic), and has placed it as an adjective before that word (grandfather). That the said two phrases of themselves form a different sentence unconnected with the word 'grandfather,' is evident from all the editions of the Sirájiyyah (in Arabic), more especially from the edition made by the learned Translator himself, wherein by putting vowel-marks over the words "*jaddi* (grandfather's, or, of the grandfather,)" as well as over the term "al-ákrabu, (the nearest)" he has unequivocally shown that they have no connection with each other, but that they are members of two different sentences, the first ending in 'jaddi' which is in the genitive case meaning 'grandfather's,' and the second beginning with 'al-ákrabu' which is in the nominative case, signifying 'the nearest.' Now had the term 'Al-ákrabu' been an adjective qualifying the term 'jaddi' it would have certainly borne the vowel-mark (not of the nominative case, as it actually bears, but) of the genitive or possessive case as the word 'jaddi' bears; since in Arabic, adjectives agree in gender, number, and case, with the nouns they qualify (in the same manner as they do in Sanskrita, Greek, and other ancient languages); and the Commentator Sharíf, who also is a very high authority,† would not have commented upon the term 'grandfather' without qualifying it by the epithet 'the nearest.' On the contrary, he concludes the sentence with the word 'jaddi (grandfather's)' by using disjunctively after it the word '*fa* (then),' and then between this and the term al-ákrabu (the nearest), he inserts the following words as being the implied part of the next sentence. "Then, of these classes, and the grades thereof, the preferable is'—and immediately after these, he quotes the term 'al-ákrabu (the nearest).' So the complete sentence next after the one ending with the term 'jaddi (of the grandfather)' runs thus: "Then of these classes, and the grades thereof, the preferable is the nearest, *then* the nearest (after him)." Moreover, by prefixing to the word 'jaddi,' the term 'al-ákrabu' (which, as above shown, forms the first part of a different sentence), the learned Translator has omitted to translate the other part 'fal-ákrabu (then the nearest) which, together with the preceding part 'al-ákrabu,' forms one of the four general rules,‡ to which recourse is invariably had by the Muhammadan lawyers in regulating the order of succession and ascertaining the preferable claim.

* *Vide* Sirájiyyah, Arabic, page 39.
† *Vide* Introductory Lecture, pages 48 & 49.
‡ *Vide* Preliminary Remarks, pages 85 & 86.

Principle. Of sons and sons' sons.

XXVII. The sons of the deceased being the nearest are entitled to succeed in preference to all other residuaries, next to them are their sons how low soever.

Corollaries to Principle xxvii.

1. If either of the parents of a child has been a Musulmán, or has, after its birth, become so, that child too is a

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Annotations.

Mr. Neil Baillie, who appears to have drawn his knowledge of this law from the very fountain head, Arabic, has, in his Muhammadan Law of Inheritance, noticed the error in question and set it right by citing unquestionable authorities as will be presently mentioned.

xxvii. Then out of these classes, and the grades thereof,* *the nearest succeeds first, then the nearest* (after him; (that is, they are preferable according to the proximity of the degree);† by this I mean out of them the offspring of the deceased, that is his sons, are preferably entitled to inheritance, then their sons how low soever.—Sirájiyyah, Arabic, page 39.

The nearest of the residuaries is the son; then the son's son, how low soever.—Fatáwá Alamgírí, Vol. VI, page 628.—See B. Dig., page 691.

The nearest of them (succeeds first), *then* the nearest (after him) in the following order:—The offspring of the deceased, namely, his son, then his (the son's) son, how low soever.—Durr-ul-Mukhtár, page 864.

The nearest of the residuaries in their own right to the deceased are the legitimate sons of body, then their sons, then their sons' sons how low soever.—Fatáwá Sirájiyyah, page 568.

1. A child is a Musulmán if either of its parents has been, or has become a Musulmán; and a scribe, if one of its parents is a Majúsí and the other, a Scribe, because in religion, a child follows the best of its parents.—Sharh-ul-Vikáyah, Vol. II, page 134.

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* Sharífiyyah, Arabic, pages 38 & 39.

† The original of the two phrases in italics is "Al-ákrabu, fal-ákrabu," which form one of the three most important rules of the law of inheritance, and by which the order of succession is regulated. The *verbatim* translation of the rule above quoted is—"the nearest, then, the nearest." Mr. Neil Baillie, however, has translated it by—"the nearest is the nearest," omitting, perhaps inadvertently, the word "*fa* (then)," which, prescribing the order, is the most important part of the rule, and without which the wording of his translation constitutes no rule at all, as every body knows that 'the nearest is the nearest.'—See B. M. L., page 80.

Musulmán, and entitled to inherit from its Musulmán parent. LECTURE II.

2. A child born in lawful wedlock is, unless the contrary is satisfactorily proved, held to be a child of the mother's husband, and, as such, it is entitled to inherit from him.

3. The child born of a free woman, who, as a wife, lived in continual co-habitation with the late owner, is, if acknowledged by him to be his issue, and if nothing rendered his marriage to the woman impossible or illegal, held by law to be a legitimate child of his body, and is entitled to inherit from him,—the marriage between the parents being presumed or inferred from the above circumstances.*

4. But even if such child were not expressly acknowledged by the late owner to be his issue, still the legitimacy of it may be presumed, or inferred, from the circumstance of its parents continually living together as husband and wife, even without any direct proof of marriage between them, or of any formal act of legitimation, provided the connection were not such as marriage ought not to be presumed, which would otherwise be. To bastardise a child born of two free persons living in continual co-habitation as husband and wife, absolute disproof of the legitimacy of marriage is necessary.†

5. A child born of a female slave,† if acknowledged by its mother's master, is held to be the legitimate son, or

ANNOTATIONS.

5. A female slave who has given birth to a child begotten by her master is termed "*Ummi-walad* (child's mother)." Such child would not, however, be the master's issue, unless acknowledged by him to be so; and after this acknowledgment, if she bear another child, the parentage of this also is established (that is traced to him) without being claimed, but disapproved, if denied, by him.—Sharh-ul-Vikáyah (Arabic), Vol. ii, page 190.

* *Vide* marriage, parentage, and acknowledgment.
If a man acknowledge another to be his son, and there be nothing which obviously renders it impossible that such relation should exist between them, the parentage will be proved.—Macn. M. L., Chap. VII, princ. 33.

† *Vide* marriage, parentage, and acknowledgment.

LECTURE II.

daughter, (as the case may be) of that man, and is entitled to inherit from him by right as his begotten issue.

Because, as a male, so a female slave, is the property of the master, and it is not unlawful for him to have carnal connection with her without marriage, which with a female slave is not only unnecessary but disallowed.* No proof or presumption of marriage between such parents is, therefore, necessary for the succession of such child as an heir at law. And, after one child of a female slave has been acknowledged by her master to be his issue, the other child or children, (if any,) born of her subsequently to that acknowledgment must be held to be his issue; and entitled to inherit from him even without acknowledgment on his part, provided he does not repudiate them by denial that they are his issue. (*Vide* Marriage and Parentage).

There are certain other kinds of acknowledged children who, if they do not fall under the legal exceptions or prohibitions,† are the children of their respective acknowledgers, male or female, and inherit from them.

The child of a woman, supposed to be married, or taken to be constructively married to a man, does not inherit from him, if expressly or solemnly denied by him to be his issue, or never treated by him as such. But whether the fruit of lawful or unlawful connection, a child always inherits from its mother, and her own relations on proof of its being born of her womb.† Thus,—

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* There is no marriage of a slave to his or her master or mistress.—Tharh-ul-Vekayah, Vol. II, page 119.—*Vide* marriage, parentage, and acknowledgment.

A man cannot marry a female slave, so long as he has a free wife; nor can he, under any circumstance, marry his slave girl, nor can a slave marry his mistress.—Macnaghten's M. L., Chap. IX, Princ. 14.

If a woman be the slave of a man, their intercourse will be just as lawful as if she were his wife; and it is at least fully as probable that they should have been living together in a relation, which may be constituted by sale or gift, or any other of the numerous ways that property is acquired.—B. M L., page 49.

The first born child of a man's female slave is considered his offspring, provided he claim the parentage, but not otherwise; but if after his having claimed the parentage of one, the same woman bear another child to him, the parentage of that other will be established without any claim on his part.—Macn. M. L., Chap. VII, Princ. 32.

† *Vide* parentage and acknowledgment.

6. An illegitimate child as well as a child of curse or imprecation inherits only from its mother and mother's relations, and is inherited by them (*l*).—*Vide* parentage and acknowledgment.

(*l*). So that if the son of an imprecated woman should leave a daughter, a mother, and the imprecator, the daughter would take a half, the mother a sixth, and the remainder would revert to them as if he had no father. If, besides these, there were also a husband or a wife, he or she would take his or her share, and the remainder be between the others, either as share or as return. And if a person should leave his mother, a half-brother by the mother, and an imprecated son (of his father), the mother would take a third, the half-brother by the mother, a sixth, and the remainder would revert to them, there being nothing for the imprecated son, as the deceased has no brother on the side of the father. The same is true of the walad-uż-ziná (illegitimate child.)*—Fatáwá Alamgírí, Vol. VI, page 629; B. Dig., page 693.

7. The bastard and the child of curse inherit moreover the valá or the property left by their manumitted slaves, or by the slaves manumitted by their slaves.—*Vide* Kanz-ul-Hakáyik.

ANNOTATIONS.

6. An illegitimate child as well as a child of curse inherits only (from the relations) on the mother's side, by reason of its being no residuary, and having no father.—Durr-ul-Mukhtár, page 871.

6. Illegitimate children and children of curse do not inherit except from the mother's side, because their parentage on the father's side is wanting; so they do not inherit from their putative fathers; but as their parentage on the mother's side is established, they, on account of such parentage, inherit only from their mothers and half brothers by the mother's side, the legal shares and no more. In like manner, their mothers and brothers (by the mother's side) inherit from them, the fixed legal shares and no more.—Ramz-ul-hakáyík or Ayní the celebrated Commentary on the Kanz-ud-Dakáyík.—See Introductory Lecture, pages 34 & 35.

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* That is, all those cases apply also to the bastard.

LECTURE II.

8. In one instance, however, those two differ (from each other), namely, the illegitimate child inherits from his twin brother the portion of a brother by the same mother only, whereas the child of curse inherits from his twin the portion of a brother of the whole blood.—Durr-ul-Mukhtár, page 865.

9. When the child of the son of an imprecated woman dies, the family of his father inherit to him, being his brothers; but the family of his grandfather, who are his paternal uncles, and their children, do not inherit to him. The same is true of the walad-uz-ziná (bastard).—Fatáwá Alamgírí, Vol. VI, page 629. *Vide* B. Dig., page 693.

10. An adopted son or daughter of *known* descent* has no right to inherit from his or her adoptive parents and their relatives,—the filiation of this description being neither recommended nor recognised by the Muhammadan law. Such son or daughter is, however, entitled to what may be given to him or to her under a valid deed of gift or will.†

ANNOTATIONS.

7. The residuaries of a bastard (walad-uz-ziná) and of the son of an imprecated woman (walud-ul-muláynat) are the relatives (muálí) of their mothers; for they have no father, and the kindred (Karábat) of their mother inherit to them, and they inherit to them.—Fatáwá Alamgírí, Vol. VI, page 629.—B. Dig., page 693.

8. The same is true of the walad-uz-ziná (bastard), except that there is a difference between them in one case, which is (this) that the bastard inherits from his twin brother only as a half brother by the mother, while the twin of an imprecated son inherits as a full brother.—Fatáwá Alamgírí, Vol. VI, page 629. *Vide* B. Digest, page 693.

* See *ante*, pages 89 and 92, also Parentage and Acknowledgment.

† "By the term 'adoption,' here used, affiliation by distinct claim of parentage is not intended, but merely the reception, by the adopting father, into his family, of a child, who notoriously and avowedly belongs to another family. In this particular, the Muhammadan law seems to agree with the English, and the Hindú with the Roman law. Adoption among the Romans, as among the Hindús at this day, was intimately connected with religious or superstitious notions, and it was thought disgraceful not to keep up and preserve the domestic gods and sacred things of the family. Whereas among ourselves and among the Muhammadans, it seems to have been suggested, to use an expression of Dr. Taylor, merely as a resource of orbity. The same learned author, in a note to his chapter on adoption, observes—

CASES BEARING ON THE COROLLARIES 1—10. LECTURE II.

Precedents.

According to the Muhammadan Law, a child born in wedlock is deemed to be the child of the mother's husband.—Jeswunt Sing-Jee, Ubby Sing-Jee, and Chuttur Sing-Jee, and Deep Sing-Jee, *v.* Jet Sing-Jee, and Ubby Sing-Jee. Privy Council Decisions, Sutherland's Edition, page 150; Moore's Indian Appeals, Vol. III, page 245.

According to the Muhammadan Law, the legitimacy or legitimation of a child of Muhammadan parents may be presumed or inferred from circumstances without proof, or at least without any direct proof, either of a marriage between the parents, or of any formal act of legitimation.—Mahomed Bauker Hossein Khan Bahadoor *v.* Shurfoonnissa Begum, an infant, by Syed Fareed, her grandfather and next friend. Privy Council Decisions, Sutherland's Edition, page 400; Moore's Indian Appeals, Vol. VIII, page 136.

According to the Muhammadan Law, the acknowledgment of a father renders a son or daughter a legitimate child and an heir, unless it is impossible for the son or daughter to be so.—Comda Beebee *v.* Syed Shah Jonab Ali.—W. R., Vol. V, page 132.

If the deceased during his lifetime acknowledged the parentage of those persons who now claim to be his sons; and after his death their mother make the same assertion, calling herself his widow, all these three persons will be his legal heirs. Agreeably to the Vikáyá,—"Or if a person die, having acknowledged a certain child to be his son. If afterwards the mother declare the child to have been his son and herself to have been his wife, they both inherit."—Macnaghten's Precedents of Muhammadan Law, Case lxiv.

'It is not unusual, we all know even among us, for friendship to adopt in effect, the children of strangers in blood;' but here is the plain difference between such acts of friendship and the legal adoption of the Romans; the friend and intended benefactor may change his mind when he pleases, but the adopted child at Rome obtained by the adoption legal rights of inheritance and succession to the adopter, of which he could not be arbitrarily or wantonly dispossessed."—Summary of Taylor's Roman law, Vol. i, page 74.—Note by Sir William Macnaghten, appended to case vi, of Chapter I. Precedents of Muhammadan Law.

LECTURE II.

Where there has been continual co-habitation between a man and woman, and children have been born to them, the Muhammadan Law presumes that there has been a lawful marriage, and that the children are legitimate. To bastardize the issue, absolute disproof of legitimacy of marriage is necessary.—Mussumat Hunsoo *v.* Mussummat Wuheed-oon-nissa. Agra Sudder Dewanny Adawlut Decisions for 1864, page 380.

Precedents.

A deed by a Muhammadan in which he declared "I have adopted A & B to succeed to my property" was held to be neither a deed of gift nor a testamentary gift to take effect after the death of the donor, there being a complete absence of any relinquishment by the donor or of seizin by the donee.

The Musulmán Law presumes a marriage between parties who live together as man and wife, and nothing appears to invalidate that presumption. A son, born under such circumstances, inherits equally as one born in proved wedlock, and is not divested of his right as one of the heirs to the estate of his paternal uncle, though discarded by the latter.

By Muhammadan Law, illegitimate sons of a Muhammadan by a slave girl, if acknowledged by their father, are entitled to share equally with his legitimate sons.

Acknowledgment of an illegitimate son by a Muhammadan need not be a formal acknowledgment; if it can be made out from his acts and conduct it will be sufficient.—Saiyed Walioolla *v.* Miran Saheb, son of Abdool Rahim, deceased, Reid's Bombay High Court Reports, Vol. II, page 301.

The marriage of a Muhammadan with his slave girl is ineffectual and not binding: for, lawful enjoyment, such as is obtained in marriage, accrues equally from the embrace of a slave girl.—Calcutta Sudder Dewanny Adawlut Reports, Vol. I, page 48 (New Ed., page 63.)

But where a woman is merely the nominal slave of a man, (that is to say has been sold or hired to the person with whom she resides, which condition is not slavery), her master can marry her.—Agra Sudder Dewanny Adawlut Decisions for 1864, page 380.

The acknowledgment of a brother by the heir entitles to inheritance.*—Mihr Ali and Sukeena Begum, (paupers), v. Kureem-oon-nisa Begum and Lootf Ali. Sudder Dewanny Adawlut Reports, Vol. II, page 112.—(New Edition, page 142.) Precedents.

Adoption confers no right of inheritance. During the lifetime, or after the death, of the adopting father, the adopted son has no claim upon his property. The adopting father's control over his own property is absolute, and although the adopted son may be thereby left entirely destitute, he is at liberty to dispose of his property as he pleases, by sale, gift, or otherwise.—Macnaghten's Precedents of Muhammadan Law, Case vi.

XXVIII. In default of son's son how low soever, the father succeeds; in his default, the true grandfather how high soever, according to the proximity of degree. *Principle.* Of father and grandfather.

ANNOTATIONS.

xxviii. Then the deceased's root (that is father) who with one or more daughters (of the deceased) is a residuary, as well as a sharer, as is already mentioned, then the true grandfather, who is the father's father how high soever; but as regards the mother's father, he is a false grandfather, and, therefore, one of the distant kindred.—Durr-ul-Mukhtár, page 864.

Then succeeds his root or father, then the grandfather, that is father's father how high soever.—Fatáwá Sirájiyyah, page 568.

Then (inherits) his root, that is father, then his paternal grandfather, that is, father's father how high soever.†—Sirájiyyah (Arabic) page 39.

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* *Vide* Hamilton's Hidáyah, Vol. III, page 172.

† The oiginal of the above, as found in every edition of the Sirájiyyah, except that made by Sir William Jones, runs thus:—"*Summa aslu-hu, ay al-abu, Summa al-jaddu, ay, ab-ul-abi wa in alâ.*" The *verbatim* translation hereof is as above given. In Sir William Jones's edition, however, the word "*ay* (that is)" contained between the words "*al-Jaddu* (the grandfather)" and "*ab-ul-abi* (father's father)" is left out, and the translation made by him of the passage bereft of the word "*ay* (that is)" is not also quite correct. The same being as follows:—"Then comes his root, or his father then his paternal grandfather, and their paternal grandfathers how high soever." From this should be struck off the words 'and their' which are not only not in the original, but which alters the sense of the original.

LECTURE II.

Then the offspring of his father, or his brothers, then their sons how low soever.—Sirájiyyah, page 18.

Residuaries defined.

"Of the above relatives," says the author of the Sirájiyyah, in his Fatáwá Sirájiyyah,*—"those of the whole blood are, however, to be preferred to those of the half-blood."† Accordingly, the order of succession distinctly laid down by him in that work of his, is as follows:—

Principle.

Of the whole and half-brothers, and their sons.

XXIX. Then the brother by the same father and mother, then the brother by the same father only, then the whole brother's sons, then the sons of the half brother by the same father only, then their sons according to this order.—Fatáwá Sirájiyyah, page 568.

Then the offspring of his grandfather, or his uncles, then their sons how low soever.—Sirájiyyah, page 18.

The heirs inheriting according to the above rule are also fully and consecutively enumerated by the said author in his Fatáwá Sirájiyyah: The same is as follows:—

Principle.

XXX. Then the paternal uncle by the same father and mother, then the paternal uncle by the

ANNOTATIONS.

xxix. Then the offspring of his father, (namely), the brother of the whole blood, then the brother by the same father only, then the son of the whole brother, then the son of the brother by the same father only how low soever.—Durr-ul-Mukhtár, page 864.

xxx. Then the offspring of his grandfather, (that is) father's whole brother, then father's half-brother by the same father only, then the son of the father's whole brother, then the son of the father's half-brother by the same father only how low soever; then the father's uncle, then his son.—Durr-ul-Muktár, page 864.

xxx, xxxi. And the rule is the same in regard to the paternal uncles of the deceased; and, after them, to the paternal uncles of his father, and, after them, to the paternal uncles of his grandfather.—Sirájiyyah, page 11.

* See the Introductory Lecture, page 55.

† Fatáwá Sirájiyyah, (Arabic), page 568.

same father only, then the sons of the paternal uncle of the whole blood; then the sons of the paternal uncle of the half-blood as above, then their sons according to this gradation or order. Then the father's paternal uncle of the whole blood, then father's paternal uncle by the same father only, then their sons according to this order.*—Fatáwá Sirájiyyah, page 568. Of paternal uncles and their sons; fathers' paternal uncles and their sons.

To the above, should be added,—

XXXI. Then the offspring of the father's great-grandfather, then the offspring of the father's great-great-grandfather, and so on, according to the above order.* *Principle.* Of the offspring of the father's great-grandfather.

ANNOTATIONS.

xxxi. Then the grandfather's uncle, then his son how low soever, according to the (above) order.—Durr-ul-Mukhtár, page 864.

xxvi, xxxi. The nearest of the residuaries is the son; then the son's son how low soever; then the father; then the grandfather, or father's father how high soever; then the full-brother, then the half-brother by the father, then the son of the full-brother, then the son of the half-brother by the father; then the full-paternal uncle, then the half-paternal uncle by the father, then the son of the full-paternal uncle, then the son of the half-paternal uncle by the father, then the full-paternal uncle of the father, then the half-paternal uncle of the father on the father's side, then the son of the father's full-paternal uncle, then the son of the father's half-paternal uncle on the father's side, then the paternal uncle of the grandfather, then his son how low soever.—Fatáwá Alamgírí, Vol. VI, page 628.—See B. Dig., page 691.

* Sir William Macnaghten, perhaps, by blindly following the erroneous translation of the Sirájiyyah, made by Sir William Jones already noticed, (*ante*, page 118) as his safe guide, and taking the term grandfather to mean 'the nearest grandfather,' and not any higher than he, has laid down as follows:—"Where there is no son, nor daughter, nor son's son, nor son's daughter, however low in descent, nor father, nor grandfather, nor other lineal male ancestor, nor mother, nor mother's mother, nor father's mother, nor other lineal female ancestor, nor widow, nor husband, nor brother of the half or whole blood, nor son's son how low soever, of the brethren of the whole blood or of those by the same father only, nor sister of the half or whole blood, nor paternal uncle, nor paternal uncle's son, how low soever, (all of whom are termed either sharers or residuaries,) the daughter's children and the children of the son's daughter succeed; and they are termed the first class of distant kindred."—Macn. M. L., Chap. I, Princ. 43.

LECTURE II.

CASES BEARING ON THE PRINCIPLES XXX & XXXI.

Precedents.

By Muhammadan Law, descendants in the male line of the paternal great-grandfather of an intestate are within

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Now it is to be observed that as the learned Compiler has in the above passage recognised the descendants only of the grandfather (*i. e.*, father's father) to be residuary heirs, the descendants of the other true grandfathers higher than the nearest, are, in his opinion, excluded, though all of them are heirs-at-law, as has been shown with authorities paramount and decisive in matters of inheritance. See page 129.

Strange, nevertheless, to observe that the learned author has, in his preliminary remarks (p. xi) recorded an opinion which, though a right one, is quite inconsistent with the above; the same is as follows: "The residuaries by relation are the sons and their descendants, the father and his descendants, *the paternal grandfather in any stage of ascent and his descendants.*" The words in italics comprehend collaterals in the ascending line of any degree whatsoever.

The above erroneous opinion of Sir William Macnaghten is well refuted by Mr. Neil Baillie, who says, "In the right line, whether of ascent or descent, it is universally agreed that there is *no limit* to the persons who may be called to the succession, provided that these are males, and connected with the deceased through males, according to the definition already given of the term residuary. I am disposed to think, that with this qualification, the succession of residuaries in the collateral line is equally *unlimited*. It must be admitted, however, that the learned author of the Principles and Precedents of Muhammadan Law (*i. e.*, Sir W. Macnaghten) seems to entertain a different opinion, and his opinion appears to be supported by the Translator of the Sirájiyyah. Whatever respect may be due to the sentiments of these two distinguished persons, it is hardly necessary to apprize the reader that they cannot be received as authority upon a point of this kind, except in so far as they are founded upon what has been delivered by the original writers." Then quoting from Sir William Macnaghten's work the passage above cited, he (Mr. Baillie) goes on to say, "The only passage in the translation of the Sirájiyyah bearing directly on the point, that I am aware of, is the following, which does certainly seem to countenance the doctrine of the limitation of residuaries in the collateral line of the descendants of the grandfather, though it is at the same time obviously inconsistent with the general definition of the term with which the paragraph commences: 'Now the residuary in his own right is every male in whose line of relation to the deceased no female enters; and of this sort there are four classes; the offspring of the deceased and his root, and the offspring of his father and of his *nearest* grandfather, a preference being given, I mean a preference in the right of inheritance, according to proximity of degree. The offspring of the deceased are his sons first, then their sons in how low a degree soever, then comes his root, or his father, then his paternal grandfather, and their paternal grandfathers; then the offspring of his father, or his brothers; then their sons how low soever, and then the offspring of his grandfather or his uncles; then their sons how low soever.' There is nothing in the preceding quotation which cannot be reconciled with the definition of 'residuary' at its commencement, except the words 'nearest grandfather;' and we have fortunately the means of showing beyond dispute that these are an inadvertence of the Translator. In the copy of the text annexed to the translation, the vowel-marks are inserted, and if these be correct, it is obvious that the words 'nearest' and 'grandfather' cannot

the class of residuary heirs, and entitled to take to the exclusion of the children of the intestate's sisters of the whole blood. Precedents.

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agree together, and they are so distinct from each other in the Calcutta edition, which contains both the text and the commentary printed together, that the commentator stops at the word 'grandfather,' to make an observation on the sentence that concludes with it, before he suffers the reader to proceed to the next, which begins with the word nearest. The passage, as it stands in the Calcutta edition, and stripped of the commentary, a part of which has slipt into the text of Sir William Jones's copy, and may have given rise to the mistake in question, is literally as follows: 'and they are four classes: the offspring of the deceased and his root; and the offspring of his father, and the offspring of his grandfather. The nearest is nearest, I mean by this, that the first in the inheritance is the offspring of the deceased, or the sons; then their sons how low soever; then his root, or the father, then the grandfather, or father's father, how high soever, &c.' The reader will observe that the term grandfather is here taken in its proper comprehensive sense, to signify the lineal male ancestor however remote; and, but for the word nearest, the insertion of which I hope has been satisfactorily explained, there is nothing from which it can be gathered that the term was to be taken in a less comprehensive sense when the descendants of the grandfather are mentioned. It is true, that these are described a little lower down as uncles, but the word in the Arabic, which has been so translated, is one of equal comprehensiveness, being employed to designate not only the father's brothers, but the brother of any male ancestor however remote, provided he be connected with the deceased through males."—B. M. L., pages 76—81.

He then remarks: "It is to be observed, that if the enumeration of residuaries, contained in the paragraph quoted from Mr. Macnaghten's words, be complete, all relatives beyond the descendants of the grandfather are excluded, though they should fall within the general definition of the Sirájiyyah. In the following extract from the Kudúrí, a book of very high authority in Arabia, and generally supposed to be the principal source from which the author of the Hidáyah obtained the text of the law on which his own work is a commentary, the enumeration of residuaries is carried one step farther, to the descendants of the great-grandfather. 'The nearest residuaries are the sons, then their sons; then the father; then the grandfather; then the brothers; then their sons; then the sons of the grandfather, and they are paternal uncles; *then the sons of the father of the grandfather, and they are paternal uncles of the father.*' And to the same effect is the following extract from the Fatáwá Sirájiyyah. It is rather long, but contains a distinct enumeration of the residuaries in the order of their succession, which is sufficient apology for laying it entire before the reader. 'The nearest residuaries to the deceased in their own right are sons; then their sons; then the sons of their sons how low soever; then the father; then the grandfather, or father's father how high soever; then the full-brother; then the half-brother by the same father, then the sons of the full-brother; then the sons of the half-brother by the same father, then their sons in this manner; then the father's full-brother; then the father's half-brother by the same father; then the sons of the father's full-brother; then the sons of the father's half-brother by the same father; then their sons after this arrangement; *then the paternal grandfather's full-brother; then the paternal grandfather's half-brother by the same father; then their sons after this arrangement.*' In the extract cited below from the Fatáwá Alamgíri, a work of perhaps the highest authority in India, as having been compiled under the orders of

Precedents. In a suit between Muhammadans a pedigree may be satisfactorily established merely by oral evidence.—Mohidín Ahmed Khán and others *v.* Sayyed Muhammad and others.—Stokes' Madras High Court Reports, Vol. I, page 92.

According to the Muhammadan Law, descendants of a paternal grandfather's brother are entitled to rank among residuaries, and, as such, are preferable heirs to granddaughters in the female line.—Syed Meher Alí and others *versus* Syed Showkut Alí and others.—H. C., A.—Sutherland's Weekly Reporter, Vol. VIII, page 39.

The claim of a man related through females is inferior to that of relations in the male line. The appellant being in the fourth degree of descent from the common ancestor of the deceased (who was in the sixth degree of descent from such ancestor,) succeeds as heir to the deceased's estate.—Shah Ilahí Buksh *v.* Shah Casim Ali.—Sudder Dewanny Adawlut Report, Vol. I, page 98 (New Ed., page 131).

Principle. XXXII. The general rule in the succession of residuaries of the above description is that—he who

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xxxii. Then the strength of consanguinity prevails: by this I mean, he who has two relations is preferable to him who has only one relation, whether it be male or female. According to the saying of him (on whom be peace!) "Surely, kinsmen by the same father and mother shall inherit before the kinsmen by the same father only."—Sirájiyyah, page 18.

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the Moghul Government in its brightest period, the enumeration of residuaries, after proceeding in nearly the same terms as those of the last quotation, is carried one step higher to the paternal uncles of the grandfather, that is to the descendants of the great-great-grandfather. If these works are to be allowed any weight at all, it is clearly impossible that the limitation implied in the expression (descendants of the nearest grandfather) can be correct; and there is nothing else, even in Sir William Jones's translation of the passage previously quoted from the Sirájiyyah, to restrict the meaning of the definition of the term residuary, with which the paragraph commences, the comprehensiveness of which is worthy of the reader's particular attention. Now, the residuary in his own right, says the author, is every male in whose line of relation to the deceased no female enters."—*Ibid*, page 81.

The foregoing remarks are so full that they hardly require anything to be added thereto.

has two relations is preferable to him who has but one relation, whether it be male or female (*m*).* General rule.

(*m*.) Thus a brother by the same father and mother is preferred to a brother by the same father only, and a sister by the same father and mother, if she become a residuary with the daughter, is preferred to a brother by the same father only; and the son of a brother by the same father and mother is preferred to the son of a brother by the same father only; and the rule is the same in regard to the paternal uncles of the deceased; and, after them, to the paternal uncles of his father; and, after them to the paternal uncles of his grandfather.—Sirájiyyah, page 18. Illustration

XXXIII. The residuaries in another's right are four females whose shares are half and two-thirds: *Principle.*

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In the case of difference between relations as being by the same father and mother, or by the same father only, the strength of consanguinity prevails (as has been already stated). According to the Prophet's dictum, "Surely kinsmen by the same father and mother shall inherit before kinsmen by the same father only." The conclusion is (this): "In the case of relations being in an equal degree of affinity, he who has two relations is preferred (to him who has but one), and in the case of inequality in relation, he who has a superior relation is preferred (to him whose relation is inferior).—Durr-ul-Mukhtár, page 861.

xxxiii. Then (the author) commences with the residuaries in another's right, and says: "They become residuaries in another's right, that is daughters become residuaries in right of the son (who is their brother), the son's daughters in right of son's son, how low soever: and the sisters by the same father and mother or by the same father only, in right of their own brothers. These four are entitled to half and two-thirds: they become residuaries with their brothers, though supposed, as the son of the son's son makes residuaries those (females) who are equal to, or above him, in degree.†—Durr-ul-Mukhtár, pages 864, 865.

* The above rule or principle applies, however, to the case where the relations are equal in the degree of affinity; but where the case is otherwise, there the principle "The nearest, *then* the nearest," is applicable, and according to it, the relative who is higher than the rest, that is, nearer to the deceased, succeeds in preference to any relative lower in degree, even though he has two relations; for instance, a brother by the same father and mother succeeds in preference to the son or whole brother.

† See *ante*, pages 101—105.

Residuaries in another's right.

they are the daughters, son's daughters, whole-sisters, and sisters by the same father only. Of these, a daughter becomes a residuary in right of her whole-brother, a son's daughter becomes so with a son's son how low soever; the sister of the whole blood with her own or full-brother, and the sister by the same father, with her own brother; and each of these females gets half of what is taken by each of the males by whom she is rendered a residuary.* But the female who was not originally a sharer, does not become a residuary with her brother though the brother himself be a residuary heir (*n*).

(*n*.) As in the case of paternal uncle and aunt (be the latter by the same father and mother, or by the same father only), the whole of the property goes to the uncle and not to the aunt.† Such is also the case with the paternal uncle's son and daughter by the same father and mother or by the same father only, and also with the brother's son and daughter by the same father.‡

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The residuaries in another's right are four females; they are those whose shares are half and two-thirds, and who become residuaries in right of their brothers as we have before mentioned in their different cases. But she who has no share among females, and whose brother is a residuary heir, doth not become a residuary in his right.—Sirájiyyah, page 19.

This is because the *Hadís* or *Kurán* does not recognise women's becoming residuaries with males, except in two instances: (*viz.*) daughters with sons, and sisters with brothers, as you have just known (from what is above mentioned). Both of these two descriptions of females, (*viz.*, daughters and sisters) are sharers: Consequently she who has no share among females is not comprehended in the *Hadís* or *Kurán*. In like manner, a brother makes his sister a residuary from the state of being a sharer which she is in the case of being without a brother, in order that females may not have ascendance over males, or they both may not be equal (in right).—Sharífiyah, page 41.

* See *ante*, pages 100—107.
† See Sirájiyyah, page 19.
‡ Sharífiyah, page 41.

XXXIV. Residuaries together with others are females who become residuaries with other females (*p*).—Sirájiyyah, page 19. *Principle.* Residuaries with others.

(*p*.) As a sister (by the same father and mother, or by the same father only*) with a daughter (be she the deceased's own daughter or his son's daughter, one or more in number,) as we have already mentioned.—Sirájiyyah, page 19.

XXXV. When there are several residuaries of different kinds,—one a residuary in himself, one a residuary rendered by another, and a third a residuary with another,—preference is given to propinquity to the deceased; so that the residuary with another, when nearer to the deceased than the residuary in himself, is the first.† *Principle.* Of different kinds of residuaries.

Thus, when a man has died, leaving a daughter, a full-sister, and the son of a half-brother by the father, a half of the inheritance is to the daughter, a half to the sister, and nothing to the brother's son, because the sister becomes a residuary with the daughter, and she is nearer to the deceased than his brother's son. So, also, when there is with the brother's son a paternal uncle, there is nothing to the uncle. And, in like manner, when in the place of the brother's son there is a half-brother by the father, there is nothing for the half-brother.—Fatáwá Alamgírí, Vol. VI, page 629.—B. Dig., 694.

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xxxiv. Residuaries together with others are the sisters with daughters or with son's daughters; for the Legislators say: "make the sisters residuaries with daughters."—Durr-ul-Mukhtár, page 865.

As to residuaries together with others: such is every female who becomes a residuary with another female.—Sirájiyyah, page 19.

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* Sharífiyah, page 41.

† Fatáwá Alamgírí, Vol. VI, page 629.—B. Dig., page 694.

Principle. Residuary for special cause.

XXXVI. The residuary for special cause is the manumittor of a slave (*q*), then the male, and not the female, residuary heirs of the manumittor, in the order before stated (*r*).—*Vide* Sirájiyyah, p. 19.

(*q.*) The manumittor inherits from the manumitted in general, whether he be manumitted for the sake of God, or for the sake of Satan (to render him propitious), or upon the condition of continuing under (his) control, or upon the condition of not taking his *valá*,* or upon the condition of his giving or not giving (some) property, or as a mukátab,† or for other causes.—Sharífiyyah, page 42.

(*r.*) The order (of succession) of these residuary heirs is the same as already shown. Accordingly,—

Of the residuaries of the manumittor, his son is the best (or first entitled), then his son's son how low soever, next, his (the manumittor's) father, then the grandfather, how high soever, extending to the end of the residuaries by relation.—Sharífiyyah, page 42.

Female residuaries for special cause.

XXXVII. Females do, however, inherit from a slave when they have themselves manumitted a slave, or their freedman has manumitted one, or

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xxxvi. According to the saying of him (on whom be blessing and peace!) "The master bears a relation (valá) like that of consanguinity."—Sirájiyyah, page 19; Durr-ul-Mukhtár, page 865.

The residuaries end with the residuary for special cause, namely, the manumittor of a slave; then his own residuaries according to the order already mentioned. In this instance, there is no residuary in another's right, nor with another, according to the saying of him (on whom be blessing and peace!) "Women have nothing from their relation to freedmen, except when they have themselves manumitted a slave, &c."—Durr-ul-Muktár, page 865.

In the special case of emancipated slaves, the surplus does not revert to the sharers on failure of residuaries by descent, but passes to the manumittor, who is thus in consequence termed the last of the residuaries. If the emancipator be dead, his residuaries are called to the

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* See *ante*, page 90.

† See Section on Impediments to Succession.

they have sold a manumission to a slave (*s*), or their vendee has sold it to his slave, or they have promised manumission after their death, or their promisee has promised it after his death, or unless their freedman or freedman's freedman draw a relation (to them).—*Vide* Sirájiyyah, page 19.

(*s*). If a woman manumit a slave, and that slave purchase another slave, and manumit him, then the secondly manumitted (slave) die, and there be no residuary by relation (him surviving,) and if the first slave has already died, and his residuary heir (also) died before him, then his (the second slave's) inheritance devolves on this woman as a residuary by reason of *valá*. Such is also the law in the case of a slave who is made a Mukátab by the slave who also has been made a Mukátab.—Sharífiyyah, page 43.

Málik, however, says:—

XXXVIII. "If a person manumit a slave for the sake of Satán, or upon condition that the valá or inheritance would not devolve upon him, (then) he shall not be entitled to it, inasmuch as that is a legal reward, and he who acted for the sake of the Satán committed a sin by the manumission; he therefore must be deprived of such reward. And he also who manumitted (a slave) expressly renouncing (his) claim to the valá is not entitled to the same.—Sharífiyah, page 42.

Principle.

According to Málik.

"According to our opinion, however," says Sharíf, "the cause of being entitled to the *valá*, is the manumission, as is said by the Prophet: 'The *valá* is for him who gives freedom;' and this cause is applicable to all these cases."—Sharífiyyah, page 42.

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succession in the order already explained; his sons first, then his son's son how low soever, then his grandfather, and so on. When there are legal sharers of the slave's estate and nothing but residue passes to the emancipator, it is hardly out of the ordinary course of the law that his residuaries should be substituted for him in the event of his death, instead of general heirs.—B. M. L. M., pages 83 & 84.

Principle. XXXIX. The father of the manumittor is not allowed to participate with a son according to the concurring judgments of Abú Hanífah and Muhammad.

The last opinion delivered by Abú Yusuf was in favor of the father, whom he considered to be entitled to a sixth. But even he agreed with the others in assigning nothing to the grandfather in such circumstances.—B. M. L., pp. 83 & 84.

Principle. XL. If a son and grandfather of the manumittor be left (him surviving), then the whole right over the freedman's property goes to the son, as all the Learned agree.* If, however, brothers and grandfather (of his master) be left by the freedman, then the inheritance goes solely to the grandfather.†

Of a manumittor's son and grandfather.

Principle. XLI. The residuary of an illegitimate child, or that of a cursed or imprecated child, is its mother's residuary relation in the case of her being a freewoman, and her master, in the case of her being a slave.

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xxxix. If a freedman leave (him surviving) the father and son of his manumittor, then according to Abú Yusuf a sixth of the right over the property of the freedman vests in the father, and the residue in the son; but according to both Abú Hanífah and Muhammad, the whole right vests in the son.† The latter doctrine is prevalent.

"This (latter)," says Sharíf, "is approved of also by Sayíd the son of Masayíb, and is the doctrine of Sháfií."—Sharífiyyah, page 44.

xl. If a freedman leave the father and the son of his manumittor, the whole (of the property left by the manumitted) goes to the son. Abú Yusuf, however, is of opinion, that a sixth goes to the father.—Durr-ul-Mukhtár, page 865.

xli. The residuary of an illegitimate child or that of a cursed child is the lord of its mother. The term "lord" intends the manumittor as well as the residuary (of the mother,) in order that the same may comprehend (also) the case of the mother's being a free woman by birth, as is laid down by Allámah Kásim, because those two descriptions of children have no father.—Durr-ul-Mukhtár, page 865.

See Ramz-ul-Hakáyík, a celebrated Commentary on the Kanz-ud-Dakáyík.

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* Sirájiyyah, page 19. † Durr-ul-Muktár, page 865.

LECTURE III.

ON ZAVÍ-UL-ARHÁM *(Distant kindred)*.

Preliminary remarks.

OF the three classes of heirs, two, namely, 1 — the sharers (zaví-ul-farúz), and 2—the residuaries (asabah) have been treated of: now I come to the third class of heirs, who are called zaví-ul-arhám, the lexicographical signification of which is 'uterine relatives,' but in law it denotes relatives who are neither sharers nor residuaries, but those who succeed after all of them, and as such they are rendered in English "distant kindred." Accordingly, where there are no sharers, namely, the husband, wife, true grandmother, mother, brothers and sisters by the same mother only, father, true grandfather, how high soever, daughter, daughter of a son how low soever, whole-sister, half-sister by the same father only, and also no residuaries, namely, the deceased's own children, the children of his son how low soever, father, true grandfather how high soever, father's male offspring how low soever, and the male offspring, how low soever, of the true grandfather, great-grandfather, great-great-grandfather, and so on, the distant kindred succeed according to their classes and claims;* and when there is only one of them, he or she, like a residuary, takes the whole property.†

The distant kindred are of four classes:—The first class comprises the children of daughters, and son's daughters; the second (comprises) the false grandfathers and false

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* See Principle xlvii *and seq.*

There is (however) an exception to the above general rules relative to the succession of distant kindred after residuaries. If the estate to be inherited belonged to an enfranchised slave, his manumittor and the heirs of such manumittor inherit in preference to the distant kindred of the deceased.—Macn. M. L., Chap. I, Sect. iii, Princ. 48.

† *Vide* Principles xliv and lix.

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grandmothers; the third (consists of) the daughters of full-brothers, and of half-brothers by the same father only, and the children of half-brothers by the same mother only, also the children of sisters in general; and the fourth class comprises father's half-brothers and sisters by the same mother only, and their children, (the deceased's) paternal aunts and their children, maternal uncles and aunts and their children, and the daughters of full-paternal uncles and half-paternal uncles by the same father only. These, and all that are connected with the deceased through them, are his distant kindred.*

The general order of succession of the distant kindred is according to their classification; that is, the first class succeeds first, then the second, then the third, and then the fourth class. And the order of succession among the individuals of each class is according to the proximity of degree of their relationship to the deceased.

So of the distant kindred of the first class,—the nearest succeeds in preference to the rest; and when all the individuals are equal in the degree of relationship, then the child of an heir—whether a sharer or residuary—is preferred; but if all of them are, or none of them is, related through an heir, then a male has double the portion of a female, provided the sexes of their roots, or of ancestors in any stage, did not differ,—otherwise each, or each set, of the claimants takes the portion of *that* ancestor who differed in sex from the ancestor of any other claimant or set of claimants. For instance, the two daughters of the daughter of a daughter's son will get twice as much as the two sons of the daughter of a daughter's daughter; because one of the ancestors of the former was a male, whose portion is double that of a female.†

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* See Principles xlv and xlvi.

† The above is Muhammad's opinion, which is adopted in preference to that of Abú Yusuf who holds that where the claimants are on the same footing with respect to the persons through whom they claim, regard should be had to the sexes of the claimants themselves, and not to the sexes of their ancestors. So according to his doctrine, in the above case, the two daughters of the daughter of a daughter's son will get two shares only (one each), and the two sons of the daughter of a daughter's daughter will get four shares (two each), two sons being equal to four daughters, and no regard being had to the sexes of their ancestors but of themselves.—*Vide* Principle li, *et seq.*

The rules for the succession of the second class of distant kindred are nearly the same as those for the first class, proximity to the deceased forming the principal ground of preference in both, and the nearer taking precedence of the more remote by whatever side related. Thus the maternal grandfather is preferred to all the others as he immediately precedes the parents of the deceased; and the father of the paternal grandmother is, in like manner, preferred to the father of the paternal grandmother's mother. When the claimants are in the same degree of propinquity to the deceased, he who claims through an heir is entitled to preference. Thus the father of the mother's mother, who is a true grandmother, and therefore an heir, is preferred to the father of the mother's father, who is a false grandfather and not an heir. When the claimants have no pretensions through an heir or heirs, but are related on the same side and through persons of the same sex, then the difference is to be considered in the persons of the claimants themselves, and the distribution is made on the principle of two shares to a male and one share to a female. But if the claimants (though equal in degree and side) are related through persons of different sexes, then the property is to be divided at the stage where the difference first appears, and allotted in the manner already explained. If, on the other hand, the sides of relation differ, that is, at the earliest stage some of the claimants are related to the deceased by the father's side, and others by the mother's side, then the property is to be divided *ab initio* into three parts, whereof two are to be allotted to the claimants on the father's side, without regard to the sexes of the claimants.

The order of succession of the distant kindred of the third class also is according to the degree of relationship and strength of consanguinity. The nearest to the deceased inherits in preference to the rest; so, of the claimants equal in relationship, the child of a residuary is preferred to the child of a more distant kinsman or kinswoman. But when the claimants are equal in the degree of relationship, and none is a child of a residuary, or all, or some, of them are children of residuaries, and some, of sharers, then, according to Muhammad (whose doctrine, in respect of the distant kindred, is the prevalent one), the property is divided (first) with reference to the branches as well to the

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sides of the roots; and then what is allotted to each set is distributed among the branches thereof, as done in the first class. Where, however, there are children of a half-brother and half-sister by the same mother only, there the division is made not with reference to the sides of their roots, but equally between the two branches, since, in the proportion of shares, there is no difference between the brothers and sisters by the same mother only, and all of them share equally.

The succession of the distant kindred of the fourth class (which comprises the paternal uncles and aunts by the same mother only, paternal aunts, and maternal uncles and aunts) is regulated as follows:—

1. When there is only one of them, he or she inherits the whole property.

2. When they happen to be related to the deceased by the same side, preference is given to the strength of relationship, that is, the person related by both parents is preferred, whether male or female, to one connected by the same father only, and this (latter) is preferred to one related only through the mother.

3. When there are male and female claimants, all equal in point of relationship, then the portion of the male is double that of the female, according to the general rule—"male has the portion of two females."

4. But when the claimants are of different sides, then no preference is given to the strength of propinquity, but two-thirds of the property go to the relatives by the father, and one-third goes to those by the mother, and the same is divided equally among the individuals of each side or set.

The succession of the children of the distant kindred of the fourth class is, in a great measure, regulated according to the same principles as that of the distant kindred of the first class. That is, I—The nearest to the deceased, on whatever side related, is first entitled to the inheritance. II—Among the equidistant relatives all on the same side, he who has the strength of consanguinity is preferred to the rest. III—When the claimants equidistant in relationship have equally the strength of consanguinity, then the child of a residuary is preferred to one who is not so.

IV—When the claimants, though equidistant, are not related to the deceased by the same side, then no preference is given to the strength of consanguinity, nor to the circumstance of any of them being the child or children of a residuary, but two-thirds go to the kindred related through the father, and one-third goes to those related through the mother; and where there are males and females equal in the strength of propinquity, then each male has the allotment of two females.

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XLII. "The generality of the (Prophet's) companions,"* says the author of the Sirájiyyah, "repeat a tradition with respect to the inheritability of distant kindred; and according to this, our masters (Abú Hanífah, Abú Yusuf, Muhammad, Zufar and their followers),† have given decision."—Sirájiyyah, page 38.

Principle and authority.

XLIII. Zayīd the son of Thábit, however, says (according to a tradition less general);†—"There is no inheritance for the distant kindred, but (in default of sharers and residuaries)† the property should be placed in the Public Treasury (Bayīt-ul-Mál), and with him agree Málik and Sháfií.‡—Sirájiyyah, pages 38 and 39.

Principle.

According to Málik and Sháfií.

XLIV. The distant kindred are all those relatives who are neither sharers nor residuaries: they are

Principle.

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xliv. The distant kindred are all relatives who are neither sharers nor residuaries; and they are like the residuaries insomuch that when there is only one of them he takes the whole property.—B. Dig., p. 705.

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* That is, many of them, such as Umar, Alí, Abnu Musúd and others.—Sharífiyah, pages 99 and 100.

† Sharífiyah, page 100.

‡ Zayīd, the son of Thábit, however, was of opinion that the property ought rather to be made over to the Bayīt-ul-Mál, in which respect he has been followed by Málik and Sháfií. But Abú Hanífah and his followers have adopted the more general opinion; for which there is the further sanction of a text of the *Kurán*, though it does not occur in the Chapter on Inheritance.—B. M. L., page 127.

LECTURE III.

Preliminary remarks.

the third kind of heirs who inherit neither with the sharers nor with the residuaries, except with the husband and wife, by reason of no return being made to them.* So, in the case of there being a single heir (of the description of distant kindred), he or she will take the whole property by (right of) relationship, and the nearest of them will exclude the distant, in the same order (or manner), as in the case of residuaries.—Durr-ul-Mukhtár, page 870.

Of the distant kindred, there are four classes:†—

Principle.

XLV. The first class is descended from the deceased; and they are the daughter's children (how

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xlv. They are of four classes:—the offspring of the deceased, then his root, then the offspring of his parents, and then the offspring of his two grandfathers or two grandmothers. The offspring of the deceased are first (entitled): they are the daughter's and son's daughter's children, how low soever, then his (the deceased's) roots, namely, the false grandfather and false grandmother, how high soever; then the offspring of the parents of the deceased: they are the children of sisters by both parents, or by the same father only, and the children of the brothers and sisters by the same mother only, and the daughters of brothers by both parents, or by the same father only, how low soever, the grandfather being preferable to them in contravention of the opinion of the two disciples; then the offspring of the two grandfathers or the grandmothers: they are the maternal uncles and aunts, and the uncles by the same mother only, and paternal aunts, the daughters of paternal uncles and their children, then the paternal aunts of the male and female ancestors, and their maternal uncles and aunts, and their paternal uncles by the same mother only of the lineal male ancestors, and all the paternal uncles by the female ancestors, and the offspring of these, how distant soever they be, in the ascending and descending degrees of affinity.—In every one of these classes, the nearest is preferred (to the distant).—Durr-ul-Mukhtár, page 870.

* *Vide*, however, the Section on Return, where it will be found that according to the modern doctrine Return is made to the husband as well as to the wife: consequently, now the distant kindred cannot inherit with them also.

† Sirájiyyah, page 39.

low soever,*) and the son's daughter's children (how low soever.*) The second class is (composed of) those from whom the deceased is descended: they are the excluded grandfathers, (that is, the false grandfathers, how high soever, as the deceased's mother's father, and mother's father's father,*) and the excluded grandmothers, (namely, the false grandmothers, how high soever, as the mother of the deceased's mother's father, and mother of his mother's father's mother's mother.*) The third class is descended from the parents of the deceased; and they are the sisters' children (how low soever, be such children male or female, and be the sisters by the same father and mother, or by the same father only, or by the same mother only,*) and the brother's daughters (how low soever, whether the brothers be by the same father and mother, or by one of them two,*) and the sons of brothers by the same mother only (how low soever.*) The fourth class is descended from the deceased's two grandfathers (namely, father's father, and mother's father,*) and the two grandmothers (namely, father's mother, and mother's mother;*) and they are the paternal aunts (in general), paternal uncles by the same mother

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xlv and xlvi. Of the distant kindred there are four classes. The first comprises the children of daughter's and son's daughters; the second are the false grandfathers and false grandmothers; the third are the daughters of full-brothers and of half-brothers by the father, the children of half-brothers by the mother, and the children of all sisters; the fourth are the paternal uncles by the mother (that is, the half-brothers of the father by the same mother), and their children, paternal aunts and their children, maternal uncles and aunts and their children, and the daughters of full-paternal uncles and half-paternal uncles by the father.—Fatáwá Sirájiyyah, vol. vi, page 637.—B. Dig., page 705.

* Sharífiyah, pages 101 and 102.

LECTURE III. only, and the maternal uncles and aunts (for they are the brothers and sisters of the mother of the deceased*).—Sirájiyyah, page 39.

Principle. XLVI. These and all who are related through them (to the deceased†) are among the distant kindred (*t*).

(t.) By the expression "all who are related through them" is meant those whom I have intimated by the term "how high soever," and "how low soever," in the three preceding classes. Accordingly, it comprehends (here) the children of the fourth class, but it does not comprehend those who are in the ascending line of the paternal uncles aforesaid, the paternal aunts, maternal uncles, and maternal aunts;—namely, the paternal uncles and aunts of the deceased's parents, and their maternal uncles and aunts, and the paternal uncles and aunts of the deceased's parent's parents, and their maternal uncles and aunts, even though they are distant kindred. And it was for this reason that the author has used the expression "out of (the distant kindred)" in order to indicate that the extent of the distant kindred is not confined to those mentioned in the four classes, and those who are related through them.—Sharífiyah, page 102.

Abú Sulaimán reports from Muhammad, the son of Hasan, (who reported) from Abú Hanífah, that of the (above mentioned) classes, the nearest (to the deceased, and preferably entitled to heritage,†) is the second class (which comprises the excluded grandfathers and grandmothers,) how high soever they ascend, then the first, how low soever they descend, then the third, how low soever they descend, and, lastly, the fourth, how distant soever their degree be (in the ascending and descending lines.†)—Sirájiyyah, page 39. But,—

ANNOTATIONS.

xlvi. These and all that are connected with the deceased through them are his distant kindred.—Fatáwá Alamgírí, vol. vi, page 637.—B. Dig., page 705.

* Sharífiyah, pages 101 and 102.
† Sharífiyah, page 102.

Abú Yusuf and Hasan the son of Ziyád report from Abú Hanífah, and Ibnu Samát reports from Muhammad the son of Hasan, who also repots from Abú Hanífah,* that— LECTURE III.

XLVII. The nearest of the (four) classes (and preferably entitled to inheritance†) is the first class, then the second, then the third, and then the fourth, like the grades of the residuaries, and this is taken as a rule‡ (for decision).—Sirájiyyah, page 39. *Principle.* General order of succession.

XLVIII. Of the individuals of the first class, which comprises the children of daughters and son's daughters, the person preferably entitled to the succession, is the nearest of them in degree to the deceased. Thus the daughter of a daughter will take the whole inheritance, though alone, in preference to the daughter of a son's daughter.§—*Vide* Sirájiyyah, page 40. *Principle.* Succession of the first class.

ANNOTATIONS.

xlvii. The first class of the distant kindred is the first in succession though the individual claimant should be more remote than one of another class. The second is the next; then the third; then the fourth; according to the order of the residuaries. And this has been adopted.—Fatáwá Alamgírí, vol. vi, page 637.—B. Dig., page 705.

xlviii. The best entitled of them to succession is the nearest of them in degree to the deceased; as the daughter's daughter, who is preferred to the daughter of the son's daughter.—Sirájiyyah, page 30.

* Sharífiyah, page 102. † Sirájiyyah, page 39.

‡ There are contrary reports of Abú Hanífah's opinion respecting the order in which the several classes of the distant kindred are to be called to the succession. But the one more generally received, and that according to which cases are decided, is, that they are called in the order in which they are above enumerated.—B. M. L., page 128.

§ The rule with regard to the succession of the first class of distant kindred is, that they take according to proximity of degree, and, when equal, those who claim through an heir, have preference to those who claim through one not being an heir. For instance, the daughter of a son's daughter and the son of a daughter's daughter are equidistant in degree from the ancestor; but the former shall be preferred, by reason of the son's daughter being an heir, and the daughter's daughter not being an heir.—Macn. Prec. M. L. Chap. I, Sect. iii, Princ. 49.

Principle. XLIX. If (the claimants be) equal in degree, (for instance, if all of them be related to the deceased in the second or third degree of affinity,*) then the child of an heir is preferred to the child of a distant relation, as the daughter of a son's daughter is preferred to the son of a daughter's daughter.†—Sirájiyyah, page 40.

The author of the Durr-ul-Mukhtár moreover says:—

Principle. L. If (the claimants be) equal in sides, as well as in degree, then the child of an heir is preferred; but, if the sides differ, the person related by the father's side is entitled to two-thirds, and the person related by the mother's side is entitled to one-third."†—Durr-ul-Mukhtár, page 870.

LI. But if their degrees be equal, and there be not among them the child of an heir, (as the daughter

ANNOTATIONS.

li. And in the case of equality, if the condition of the roots, as male or female, agree, then the persons of the branches are unanimously considered; but if branches as well as roots disagree, (as the daughter of a daughter's son, and the son of a daughter's daughter), then according to Muhammad the roots are considered, and the property is divided according to the difference between the male and female sexes, wherever it first occurs, which in this instance occurs in the second generation,—namely, the daughter's son, and daughter's daughter. Thus Muhammad considers the equality of the root in the second generation, in the instance in question, and divides (the property) between them in thirds, and gives to each of the branches the portion of its root; consequently two-thirds go to the daughter of the daughter's son, the share of her father, and one-third goes to the son of the daughter's daughter, the same being the share of his mother. This is fully laid down in the Sirájiyyah and the commentaries thereon.—Durr-ul-Mukhtár, page 870.

* Sharífiyah, page 104.

† It should be recollected, too, that, whenever the sides of relation differ, those connected through the father are entitled to twice as much as those connected through the mother, whatever may be the sexes of the claimants. Note by Sir William Macnaghten.

of a daughter's son, and the son of a daughter's daughter,*) or if all of them be related by an heir, then Muhammad considers the persons of the branches, if the sex of the roots agree, in which respect he concurs with the other two (lawyers,†) but if their sexes be different, he considers the persons of the roots, and gives to the branches the inheritance of the roots (*u*).‡—*Vide* Sirájiyyah, page 40.

Principle.

The opinion of Muhammad is the more generally received of the two traditions from Abú Hanífah in all the decisions

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li. If the claimants are equal in proximity to the deceased, and there is no child of an heir among them, the property is to be equally divided among them, if they are all males or all females; and if there is a mixture of males and females, then in the proportion of two parts for a male and one to a female. This is without any difference of opinion when the sex of the ancestors, whether male or female, is the same. But when the ancestors are of different sexes, though according to Abú

* Sharífiyah, pages 105 and 106.

† That is with the latter opinion of Abú Yusuf, and with (the opinion of) Hasan the son of Ziyád.

‡ This is the first opinion of Abú Yusuf and the most publicly known of the two traditions from Abú Hanífah, and known to be his doctrine.—Sharífiyah, page 106.

If there should be a number of these descendants of equal degree, and all on the same footing with respect to the persons through whom they claim, but the sexes of the ancestors differ in any stage of ascent, the distribution will be made with reference to such difference of sex, regard being had to the stage at which the difference first appeared: for instance, the two daughters of the daughter of a daughter's son will get twice as much as the two sons of a daughter's daughter's daughter; because one of the ancestors of the former was a male, whose portion is double that of a female.—Macn. M. L. Chap. I, Sec. iii, Princ. 49

The opinion of Abú Yusuf is that where the claimants are on the same footing with respect to the persons through whom they claim, regard should be had to the sexes of the claimants and not to the sexes of their ancestors. But this, although the most simple, is not the most approved rule.—*Ibid.*

The opinion of Muhammad, which has certainly the appearance of being more complex than that of Abú Yusuf, was at first entertained by the latter doctor himself, though he subsequently saw reason to depart from it, and it is conformable to the more general report of Abú Hanífah's judgment. For which reason, and because it is also considered to be more agreeable to the general principle of his doctrine, respecting the succession of the distant kindred, it has been adopted by his followers as the rule of decision.—B. M. L., page 131.

LECTURE III.

concerning the distant kindred.* And decision is given according to this.

According to Abú Yusuf and Hasan, the son of Ziyád, (however), the persons of the branches are considered (even if the sexes be different,*) and property is distributed among them† (regard being had to the circumstances of their being male or female,*) whether the condition of the roots, as male or female, agree or disagree. (*u*).—Sirájiyyah, page 40.

(*u*.) For instance, when a deceased leaves a daughter's son and a daughter's daughter, then, according to them (Abú Yusuf and Hasan), the property is distributed between them by the rule—"the male has the portion of two females," their persons being considered (that is, persons of the branches and their sexes, consequently, two-thirds of the property go to the daughter's son, and one-third goes

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Yusuf the division is to be made in the same way, yet, according to Muhammad, it is only the number that is to be taken from the individual claimants, and quality of sex is to be taken from the generation in which the difference of sex first appears. Thus, if one should leave the son of a daughter and the daughter of a daughter, the property is to be divided among them in the proportion of two shares to the male and one to the female, because here the sex of the ancestors is the same; but if he should leave the daughter of a daughter's daughter, and the daughter of the son of a daughter, the property would be divided between them in halves, according to Abú Yusuf, regard being had merely to the number of the individuals; while, according to Muhammad, the property is to be divided between them in thirds, two-thirds to the daughter of the son of a daughter, and one-third to the daughter of the daughter's daughter. The Imám Asbeejanee has given the preference to the opinion of Abú Yusuf, as being of easier application, and the author of the Moheet and the Sheikhs of Bokhára have also adopted it in this class of cases.—Fatáwá Alamgírí, vol. vi, page 638.—B. Dig., page 706.

* Sharífiyah, pages 105 and 106; Sirájiyyah, page 43.

† After the term "them," Sir William Jones has used the word "equally," which is not only not in the original, but which alters the sense of the original.—*Vide* his Translation, page 31.

to the daughter's daughter;*) but, according to Muhammad, the property is divided (equally) between them in the same manner, because the sexes of the roots agree (in being females; and the persons of the roots are also considered by him).* But if a man leave a daughter of a daughter's son, and the son of a daughter's daughter, then according to the two (first mentioned lawyers*) the property is divided in thirds between the branches by considering their persons, two-thirds of it being given to the male, and one-third to the female (as in the former case;*) but, according to Muhammad, the property is (divided) between the roots, I mean those in the second generation (that is, those between whom the difference first occurred as being male and female, namely, the daughter's daughter, and daughter's son,*) in thirds,—two-thirds (in this case) going to the daughter of the daughter's son, (for that was) the allotment of her father, as if the same was transferred to her, and one-third to the son of the daughter's daughter, (for that was) the share of his mother.—Sirájiyyah, page 40.

As the opinion of Muhammad requires more explanation, the author (of the Sirájiyyah) expresses himself by saying:—"Thus, according to Muhammad, (as regard was had to the second generation which you have already known, so according to him regard is had to the roots in several generations,*) when the children of the daughters equal in rank are different (in sex,*) then the property is divided according to the first rank that differs among the roots (in being male and female, by the rule, 'the male has double the portion of a female:*') then after the division (between males and females,*) the males (of that generation*) are arranged in one class, and the females in another class, and what goes to the males (in the rank where the difference first occurred*) is collected, (and given to their branches according to their sexes,*) and distribution is made according to the highest difference that occurs among their children, (and, as already done, the males of that generation are arranged in one class, and the females in another class;*) and in the same manner, what goes to the females (is collected and allotted to their branches,*) and thus the

* Sharífiyah, pages 105, 106, and 107.

LECTURE III. operation is continued to the end according to this scheme :"*

Scheme.

S.	S.	S.	D.	D.	D.	D.	D.	D.	D.	D.	D.
D.	D.	D.	D.	D.	D.	D.	D.	D.	D.	D.	D.
S.	D.	D.	S.	S.	S.	D.	D.	D.	D.	D.	D.
D.	D.	D.	S.	D.	D.	S.	S.	S.	D.	D.	D.
D.	S.	D.	D.	D.	D.	S.	D.	D.	S.	D.	D.
D.	D.	D.	D.	D.	S.	D.	D.	S.	D.	S.	D.*

Explanation. The above case comprises in the sixth generation (*i. e.*, in the last degree) twelve persons out of the distant kindred, of whom there are three males, and nine females, and all of them are in the same rank or degree of affinity ; and none of them is the child of an heir. Now, according to Abú Yusuf and those who agree with him, the case is arranged in fifteen, because each of the sons is equal to two daughters; thus the whole of those persons are, as if they were fifteen daughters; consequently, according to him, the case is arranged with reference to the number of their persons. Thus one share goes to each of the nine daughters, and two shares to each of the three sons. But according to Muhammad, the case in question is arranged in sixty.†

* Sirájiyyah, page 41.

† On the first class of distant kindred the doctrine of Abú Yusuf has far more simplicity than that of Muhammad, in which there is an appearance of intricacy ; but an attentive reader will find no difficulty in the case reduced to the form of a table, in which the lowest of the six ranks are supposed to be the claimants of Amr's estate : he will see that Abú Yusuf would divide that estate into fifteen parts, giving one to each of the females, and two, by the rule in the *Kurán*, to each of the male descendants ; but that Muhammad would arrange it in sixty parcels, twenty-four of which would go to the representatives of the three sons, and thirty-six to those of the nine daughters ; due regard being paid to the double portion of the male descendants so as to bring the shares of the twelve claimants to the following order from the left hand, twelve, eight, four ; nine, three, six ; two, four ; three, two,

Thus: when we divide the property among the persons of the first rank of whom nine are daughters and three sons, according as mentioned (*i. e.*, done) among the branches agreeably to the doctrine of Abú Yusuf, then six shares go to the sons, and nine to the daughters. Now, if we make the three males one class (*i. e.*, arrange them in one class), and collect their allotments, that is six (shares,) and then look to the next generation below the first, we do not find any difference in sex in the second generation, but we find in the third generation below the three sons (of the first rank,) one son and two daughters; consequently, we divide the six according to the rule—"the male has the portion of two females," by which three shares go to the son, and three to the two daughters. Then we give the son's portion to the last branch, the two intermediate generations between them having agreed in sex (that is both being of the female sex,) and we arrange the two daughters (of the third generation) in a separate class, and (then) we look to those who are below the third generation, and find no difference (in sex) in the fourth generation, but find in the fifth generation a son and a daughter below them, then we divide the (remaining) three between them according to the rule,—"the male has the portion of two females," by which two go to the son and one to the daughter; then we give the share of each of them to his or her branch in the sixth generation. In like manner we arrange the nine daughters (of the first rank) in one class, and collect what was allotted to them, namely, nine (shares,) and then if we look to those who are next below the first rank, we find no difference (in sex), but we find a difference in the third generation, there being six daughters and three sons; consequently, when we take each of the sons to be equal to two daughters, the whole number amounts as if they were twelve daughters, and they being so many, the nine (shares) which were allotted to the daughters (above them) cannot be divided amongst them, without a fraction. There is, however, agreement in third between nine and twelve the number of their persons;

Further explanation.

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one. The correctness of this method has, it seems, obtained it a preference over that of Abú Yusuf, whose practice, however, is followed, on account of its facility, in Bokhára and some other places; although of the two different traditions from Abú Hanífah, that reported by Muhammad be the more publicly known and the more generally believed.—Note by Sir William Jones.

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consequently, we multiply four the measure of their persons into fifteen the root of the case, and the product amounts to sixty, by which the case is settled. The three sons of the first class had six out of the root of the case, so we multiply the same into four, the multiplicand, and the product amounts to twenty-four, which we divide amongst the persons in the third rank for the descendants of the three sons, and allot twelve to the son, also twelve to the two daughters; then we give the son's share to his last branch (descendant) in the sixth degree from him, there being no difference (in sex), and divide the share of the two daughters between the son and daughter below them in the fifth rank, according to the rule,—"the male has the portion of two females," by which eight shares go to the son, and four to the daughter; and then we give the share of each of them to his as well as to her branch in the sixth generation or rank. Now, the daughters in the first rank had nine out of the root of the case, so multiply the same into four, the multiplicand in question, and the product gained is thirty-six. Then if we look to those who are below the first generation, we find a difference (in sex) in the third generation, there being three sons and six daughters below the nine daughters, and we divide their shares, that is thirty-six, according to the rule—"the male has the portion of two females," by which eighteen (shares) go to the sons, also eighteen to the daughters. Next, we arrange the males in one class, and the females in another class; then we look to those who are below the third (generation), and seeing in the fourth generation one son and two daughters below the sons, we divide amongst them what was allotted to the three sons according to the rule—"the male has the portion of two females," by which division nine (shares) go to the son, and nine to the two daughters; then we give the son's share to his last branch (descendant), there being no difference (in the middle), and as we do not find any difference in the fifth generation between the descendants of the two daughters, but we find it in the sixth generation, there being a son and daughter below those two (daughters); consequently, we divide between them the portion of the two daughters, that is, nine shares, according to the rule—"the male has the portion of two females," by which six (shares) go to the son, and three to the daughter. In like manner, we find in the fourth generation, below the six daughters, three sons and three

daughters, and so we divide eighteen amongst them according to the rule—"the male has the portion of two females," and out of the above, we give twelve to the sons and six to the daughters; then arrange them in two classes. Next we look to those who are below that generation, and finding in the sixth generation that there are two daughters and one son below the three sons, we divide twelve, which formed the share of those (three sons) according to the rule—"the male has the portion of two females," by which six go to the sons and six to the two daughters. Then we give the son's share to his descendant sixth in rank, and as there are one son and one daughter below the two daughters, we divide their share between those two, thus four go to the son and two to the daughter. In like manner, we find in the fifth generation one son and two daughters below the three daughters in the fourth degree, and accordingly we divide their shares, that is six, amongst those (in the fifth degree), whereby three go to the son and three to the two daughters: we then give the son's portion to his issue in the sixth degree; but finding in the same (degree) one son and one daughter below the two daughters (in the fifth degree,) we divide three between them, whereby two go to the son and one to the daughter. Now, if we add all these shares, they amount to sixty.—Sharífiyah, pages 109, 110. LECTURE III.

Thus Muhammad takes the sexes (that is male and female) from the root at the time of distribution, and the number from the branches.—Sirájiyyah, page 41.

As if a person leave two sons of a daughter's daughter's daughter, and a daughter of a daughter's daughter's son, and two daughters of a daughter's son's daughter, in this form: Example.

Daughter's	daughter's	daughter's
Daughter's	daughter's	son's
Daughter's	son's	daughter's
Two sons.	daughter.	two daughters.

In this case (according to Muhammad) the property is distributed according to the highest difference (of sex,) I mean in the second rank, in sevenths, by considering the number of branches in the roots.—Sirájiyyah, page 42.

Illustration.

According to him, (Muhammad), four-sevenths (of the property go) to the two daughters of the daughter's son's daughter, since that is the share of their grandfather, (who is the son in the second rank considered to be equal to two sons,*) and three-sevenths of it, which are the allotment of the two daughters (of whom one was taken to be equal to two daughters in the second rank,*) are divided between their children, I mean those in the third rank, in moieties, (consequently,) one moiety (that is half of the portion amounting to three-sevenths goes*) to the daughter of the daughter's daughter's son, (the same being) the share of her father, (who is the son in the third rank,*) the other moiety to the two sons of the daughter's daughter's daughter, (the same being) the share of their mother, (who is the daughter standing in equal degree with the son in the third rank*): this will be adjusted by twenty-eight (*v*).—Sirájiyyah, page 42.

Explanation.

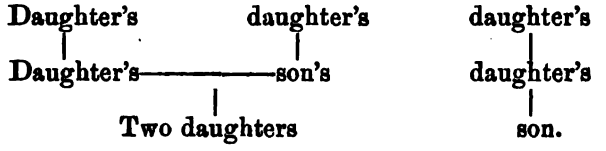
(*v.*) It is so, because, in the division, the root of the case is seven according to the highest difference of sex which (is) in the second rank, as you have already known. Then if we look to the third generation, we find, there is a son and a daughter below the two daughters in the second generation; next, if we apply to the daughter the number of her branches, she would become as two daughters, and it is proper to divide between them, that is between the son and daughter the portion of the two daughters, who are in the second rank, in equal moieties; but the three-sevenths not quadrating with two-halves, we multiply the denominator of halves into the root of the case, and the product amounts to fourteen, out of which we give eight to the two daughters of the daughter of the daughter's son, which is the portion of their grandfather; and we give three to the daughter of the son of the daughter's daughter, which is the portion of her father, and give three to the two sons of the daughter's daughter's daughter, (which is) the portion of their mother, but three cannot be divided between them (without a fraction), consequently we multiply the number of their persons into fourteen, and the product gained is twenty-eight, by which the case is adjusted; inasmuch as we must multiply eight, the portion of the two daughters

* Sharífiyah, page 111.

of the daughter of the daughter's son, into two, and the product would be sixteen, which is for them both: next we must multiply three, which is the portion of the daughter of the son of the daughter's daughter, into the multiplicand, which is two, and we gain six, which is for her: likewise, we multiply the portion of the two sons of the daughter's daughter's daughter into the multiplicand, and the product is six, and we give three to each of them.—Sharífiyah, page 111. LECTURE III.

LII. In addition to sexes as above shown, the different sides of the distant kindred in succession are considered; and in this also, the two lawyers differ—Muhammad considering the sides in the roots,* and Abú Yusuf, the sides in the persons of the branches.† *Principle.*

As when a person leaves two daughters of a daughter's daughter, who are also the two daughters of a daughter's son, and (he left also) the son of a daughter's daughter, according to this scheme:‡ *Example.*



In this case, according to Abú Yusuf, the property is (divided) among them in thirds, (because the two daughters being by both sides, are, as it were, two daughters by the *Illustration.*

ANNOTATIONS.

lii. Our learned lawyers consider the (different) sides in succession, except that Abú Yusuf considers the sides in the persons of the branches; but Muhammad considers the sides in the roots.—Sirájiyyah, page 34.

* Because he divides the property according to the first rank that differs among the roots, and applies the number of the branches to the roots, then arranges the males in one class and the females in another class, as done in the former case.—Sharífiyah, page 113.

† Because he divides the property originally according to the branches, consequently he considers the sides among them.—Sharífiyah, page 112.
The opinion of Muhammad is the prevalent one.—*Vide* pages 149 & 150.

‡ Sirájiyyah, page 43.

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mother's side, as well as two daughters by the father's side,*) and in this case, the deceased is considered as if he left four daughters and a single son; two-thirds of it, therefore, go to the two daughters by both sides, and one-third to the son, who is by one side only. But according to Muhammad, the estate is divided into twenty-eight parts, of which twenty-two shares go to the daughters (sixteen in right of their father, and six in right of their mother), and six shares go to the son in right of his mother (*w*).—Sirájiyyah, page 44.

Explanation.

(*w*). The explanation thereof is as follows:—According to him (Muhammad) the property is divided in the second generation in which there is a son equal to two sons, and two daughters, one of whom is equal to two daughters: thus the whole amounts to seven daughters; consequently, the divisor is seven after the number of their persons: accordingly, four shares go to the son, and two shares to the daughter whose branch is more than one, and one share goes to the other daughter. Then, if we arrange the males of that generation in one class, and the females in another class, and give the portion of the son to the two daughters who are in the third generation, then two shares go to each of them; and when we give the portions of the female class to those who are below them in the third generation, the same cannot be divided amongst them (without a fraction,) their portions amounting to three-sevenths, while those below them are a son and two daughters who collectively are (considered) as four daughters, and there is disagreement between three and four; then we multiply four, the number of their persons, in the root of the case, which is seven, and the product amounts to twenty-eight, by which the case is adjusted; since the daughter's son in the second generation had four, which we multiply by the multiplicand, (which also is four,) and the product amounts to sixteen, (of which) we give eight to each of the daughters: the two daughters in the second generation had three, which if we multiply into the said multiplicand, we gain twelve, then we give six (thereof) to the son of the daughter's daughter, also six to the two daughters of the daughter's daughter, (*i. e.*,) three to each of them: thus eleven go to each of the daughters in the last generation,—eight from their father's side, and three from their mother's side.—Sharífiyah, pages 113, 114.

* Sharífiyah, page 113.

LIII. Of the individuals of the second class (which comprises the excluded grandfathers and grandmothers) he, who is nearest to the deceased, is preferred in succession, on whichever side he stands (*x*). And in the case of equality (in the degree of affinity,*) he who is related (to the deceased) through an heir is preferred (to him who is not so related,*) according to the opinion of Abú Suhail, surnamed Faraedí, Abú Fudail Al-Khaffáf and Alí the son of Isá Al-Basarí.—*Vide* Sirájiyyah, page 44. *Principle.* Succession of the second class.

(*x*.) That is, whether the nearest (of them) be by the father's side or by the mother's side. The cause of the nearest being preferred is explained in the (section treating of the) first class; consequently, the mother's father is preferred to the mother's mother's father; in like manner, the father of the father's mother is preferred to the father of the mother's mother's father; and the mother's father is preferred to the father's mother's father. According to this, you should consider the succession of the female ancestors.—Sharífiyah, page 114. Illustration.

LIV. But, if their ranks (that is, degrees of affinity and distance*) be *equal*, and there be none among them who is related through an heir (*y*), or all of them be related through heirs (*z*), then, if the sex of those, through whom they are related agree, and their relation (also) be on the same side (that is either they be from the side of the father, or from the side of the mother, of the deceased,*) the distribution is made according to their persons (*a*). If, on the other hand, (notwithstanding being equal in degree*) the sexes of those, through whom they are related, are different, then the property is distributed according to the first rank that differs in sex, as is (done) in the first class (*b*).—*Vide* Sirájiyyah, page 44. *Principle.*

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* Sharífiyah, pages 114 and 115.

Example. (*y.*) As the father of a father's mother's father, and the mother of a father's mother's father.—Sharífiyah, page 115.

Example. (*z.*) As the father of the paternal great-grandfather's mother, and the father of the father's mother's mother's mother.—*Ibid.*

Explanation. (*a.*) That is, it is proper that, in the case of those circumstances happening together, the property be divided by considering the sexes of the branches according to the rule—"the male has the portion of two females." Consequently, in the case in question, the property will be divided in thirds, and two-thirds whereof (will go) to the father of the father's mother's father, and one-third to the mother of the father's mother's father.—Sharífiyah, page 115. (See Principle li.)

Explanation. (*b.*) That is, division will be made among them, males having double the portion of a female. Next the males are to be arranged in one class and females in one class according as is done in the first class.—Sharífiyah, page 115.

Principle. LV. And if their relation differ, (notwithstanding they be equal in degree, as in the instance of a man leaving the mother of his paternal grandfather's mother's father, and the mother of his mother's paternal great-grandfather,*) then two-thirds go to those on the father's side, that being the share of the father, and one-third goes to those on the mother's side, that being the share of the mother (*g*). Then what has been allotted to each set is distributed among them as if their relation were the same (*h*).†

Exposition. (*g.*) It should be so, because, those who are related by the father stand in his place, and those related by the mother are (substituted) in the room of the mother; consequently, the property will be divided in thirds, as if the deceased left both parents.—Sharífiyah, page 115.

Explanation. (*h.*) That is, two-thirds are allotted to the distant kindred on the father's side, and one-third to the distant kin-

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* Sharífiyah, page 116. † Sirájiyyah, page 44.

dred on the mother's side—according to the analogy of distribution cited in the case of the relation on the same side. And the rule may be thus laid down: whether their relations are equal or not, if in the negative, then the nearer is preferred; but if equal, then (it is to be seen) whether their relations agree or differ; if they differ, the property is divided in thirds as is mentioned just above; but if they agree, then if the roots agree in sex, the distribution is made according to the number of the persons in the branches, but if they do not agree in sex, the property should be divided according to the difference of sex in the highest rank as in the first class.—Sharífiyah, page 116. LECTURE III.

LVI. The rules for the succession of the third class of distant kindred, (which, as already stated, comprises the sister's children, brother's daughters, and the sons of brothers by the same mother only,*) are similar to those which concern the first class. By this is meant that, he of them who is the nearest to the deceased is, in succession, preferred to the rest (*c*).† *Principle.* Of the third class distant kindred.

(*c*.) Consequently, the sister's daughter is preferable to the brother's daughter's sons, the former being nearer in relationship.—Sharífiyah, page 116. Example.

LVII. If they be equal in relation, then the child of a residuary is preferred to the child of a more distant kinsman (*d*.)—Sirájiyyah, page 45. *Principle.*

(*d*.) As (if a man leave) the daughter of a brother's son and the son of a sister's daughter, both of them by the same father and mother, or by the same father only, or one of them by the same father and mother, and the other by the same father only: (then) the whole estate goes to the daughter of the brother's son, because she is the child of a residuary, namely, the son of a brother.—Sirájiyyah, page 45. Example.

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* Sharífiyah, page 116.

† *Vide* Sirájiyyah, page 45.

Further Example. If (a man) leave three daughters of different brothers' sons in this manner* :—

Daughter of a whole-brother's son.	Daughter of a son of a brother by the father only.	Daughter of a son of a brother by the mother only.

All the property goes (in this case) to the daughter of the whole-brother's son by the unanimous opinion (of the Learned); since she is the child of a residuary (who is the son of a full-brother, and, therefore, she is preferred to the daughter of the son by the same father only, as well as to the daughter of the son of the brother by the same mother only,†) and she hath also the strength of consanguinity (from the sides of both parents, she must, therefore, be preferred to the daughter of the brother by the same father only.†)—Sirájiyyah, page 47.

Principle. LVIII. In the case of there being a child of a brother and that of a sister by the same mother only, they, according to Muhammad, inherit in equal shares on the ground of there being no inequality between their parents in the proportion of shares, but males and females sharing equally.‡ And decision is given according to this doctrine. See *ante*, Principle vii., and pages 149, 150 and 163.

Principle. LIX. If they (the distant kindred) be equal in propinquity, and there be no child of a residuary

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ANNOTATIONS.

lviii. If they (that is, the daughter of the son of a brother, and the son of the daughter of a sister†) be by the same mother only, then according to Abú Yusuf, the property will be divided between them by the rule "the male has the portion of two females, in consideration of their persons; but according to Muhammad, the property will be divided (between them) in moieties, regard being had to the roots.† The latter is the most known tradition.)—Sirájiyyah, page 45.

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* Sirájiyyah, pages 46 and 47.

† Sharífiyah, pages 118, 119.

‡ This is fully explained by Mr. Neil Baillie, who says: "If the brother and sister in the last case, from whom the claimants are descended, had been

among them (such as brother's daughter's daughter, or brother's daughter's son,*) or if all of them be children of residuaries, (such as two daughters of two sons of a brother by both parents, or by the same father only,*) or if some of them be children of residuaries, and some of them children of sharers, (as the daughter of a brother by both parents, and the daughter of a brother by the same mother only,*) and their relation differ, then Muhammad divides the property among the brothers and sisters, considering as well the number of the branches as the sides in the roots, and what has been allotted to each set is distributed among their branches, as in the first class (*d*).†—Sirájiyyah, page 45.

The fourth class distant kindred.

The rules or principles with regard to the fourth class of distant kindred, who are the deceased's paternal aunts in general, paternal uncles by the same mother only, and maternal uncles and aunts in general, are the following:—

Principle.

LX. When there is only one of them, he or she has a right to the whole property, there being

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related to the deceased by the mother's side only, the property would be distributed differently, both according to Abú Yusuf and Muhammad; though they are not exactly agreed as to the precise mode of distribution. The former would divide the property among the claimants, according to the common rule of giving two parts to the male and one part to the female. It is true, that though this be the general principle, there is a special exception with respect to the persons through whom their rights are derived; brothers and sisters by the mother only succeeding equally, without any regard to difference of sex, upon the express authority of the *Kurán*. But this exception is not to be extended by analogy to cases where the similarity is not complete in all respects; and as the children of half-brothers and sisters by the mother are not in circumstances precisely similar to their parents, having no right for instance to inherit as sharers, they are subject to the operation of the general rule. Muhammad, however, disputes the justness of this reasoning, because the sole right of the children arises in consequence of the propinquity of their parents to the deceased; and he accordingly declares that the property ought in this case to be divided equally between the claimants, without any preference of the male over the female sex. It is to be observed, that the general current of tradition is in favour of his opinion.—B. M. L., pages 142 and 143.

* Sharífiyah, page 117.

† This (*i.e.*, the doctrine of Muhammad) is, however, the most known tradition from Abú Hanífah.—Sharífiyah, page 117.

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Example. (*e*.) As when a person leaves a single paternal aunt, or a single paternal uncle by the mother's side, or a single maternal uncle or aunt, the whole property goes to this (relative) alone, who is free from obstruction on the part of any body.—Sharífiyah, page 121.

Principle. LXI. When there are several, and the sides of their relation are the same—as paternal uncles and aunts by the same mother only,* or maternal uncles and aunts,†—then the stronger of them in consanguinity is preferred, by the general assent: that is, they who are related by the same father and mother, are preferred (in taking the inheritance‡) to those who are (related) by the same father only; and they who are (related) by the same father only, are preferred to those who are (related) by the same mother only (*f*), whether they be males or females (*g*).—Sirájiyyah, page 47.

Reason. (*f*.) Because the relation by both sides is, as is known to all, the strongest. In like manner, the relation by the father's side is stronger than the relation by the mother's side.—Sharífiyah, page 121.

Explanation. (*g*.) That is, there is no difference between male and female: consequently, the paternal aunt by the same father and mother is preferred to the paternal aunt by the same father only, or to the aunt and uncle by the same mother only, for she is stronger in relation, and, as such, she will take the whole of the property; and the aunt by the same father is preferred to the aunt and uncle by the same mother only, because of the strength of her relation. In like manner, the maternal uncle and aunt by the same father and mother are, in taking the inheritance, preferred to the maternal uncle and aunt by the same father only as well as to the maternal uncle and aunt by the same mother

* For they are from the father's side.—Sharífiyah, page 121.
† For they are from the mother's side.—*Ibid.*
‡ Sharífiyah, page 121.

only, and the uncle and aunt by the same father only are preferred to those by the same mother only.—Sharífiyah, page 122.

Principle.

LXII. And if there be males and females equal in the strength of relationship (so that all of them be either by the same father and mother, or by the same father only, or by the same mother only,*) then (each) male has the allotment of two females.—Sirájiyyah, page 47.

Example.

As in the instance of there being a paternal uncle and aunt, both by the same mother, or a maternal uncle and aunt, both by the same father and mother, or by the same father only, or by the same mother only (*h*).—*Ibid.*

Explanation.

(*h*.) Here the paternal uncle and aunt are from the same root, that is, the father; in like manner, the root of the maternal uncle and aunt is one and the same, that is, the mother; and when the roots agree, then, according to both the disciples (Abú Yusuf and Muhammad) the persons (of the branches) are unanimously considered in the division.—Sharífiyah, page 122. But,—

Principle.

LXIII. If the sides of their consanguinity be different, (so that the relation of some of them be from the father's side, and the relation of others be from the mother's side,†) then no regard is shown (that is, no preference is given) to the strength of consanguinity (*i*), but two-thirds are allotted to the kindred related through the father, and one-third to those related through the mother.—*Sirájiyyah*, page 48.

Example.

(*i*.) As if (there be) a paternal aunt by the same father and mother, and a maternal aunt by the same mother only, or a maternal aunt by the same father and mother, and a paternal aunt by the same mother only, then two-thirds go to the kindred of the father, as that are their father's allotment, and one-third goes to the kindred of the mother, as that is their mother's allotment; then what is allotted to each set, is divided among the individuals thereof, as if the place of their consanguinity were the same.—Sirájiyyah, page 48.

* Sharífiyah, page 121.

† Sharífiyah, page 122.

Illustration. So, if (a person) leave a paternal aunt by the same father and mother, also a paternal aunt by the same mother only, and with them also a maternal aunt by the same father and mother, and a maternal aunt by the same father, also a maternal aunt by the same mother only, then two-thirds of the property go to the relatives (that is the aunts) by the father's side, and one-third goes to the relatives (that is, the aunts) by the mother's side.—Sharífiyah, page 122.

Further Illustration. In the above example, therefore, the paternal aunt by the side of the father and mother will take two-thirds of the property, her relation being stronger; in like manner, the maternal aunt by the same father and mother will take one-third for the same reason. And if there be several aunts by the same father and mother, then the two-thirds will be divided amongst them in equal shares. Such is also the case in the instance of there being several maternal aunts by the same father and mother, that is, one-third will be divided among them in equal shares.—Sharífiyah, page 122.

Of the children of the fourth class distant kindred. It has been already stated,—that the first class comprises 'the children of daughters' daughters and sons' daughters,' and this expression being a general one, is taken to comprehend all those children who are related to daughters' daughters and sons' daughters mediately as well as immediately: should it, however, be intended to explain the same in detail, let our expression "how low soever" be added thereto;—that the second class comprises the excluded (*i. e.*, false) grandfathers and grandmothers how high soever, and the rule concerning them all, as you have known, is one and the same;—that although the expression is general, (yet) the children of the persons of this class are not considered (*i. e.*, comprehended) therein;—that the third class comprises the children of sisters, and brother's daughters, and sons of brothers by the same mother only, and this expression, like that of the first (class) comprehends those who are related through (them); and—that the rule concerning them is the same (as that for the first class). But as the fourth class is composed of the paternal aunts and uncles, and also the maternal uncles and aunts, the expression does not comprehend their chil-

dren. Consequently, it is necessary to mention their children in detail, and lay down rules concerning them.—Sharífiyah, page 123. LECTURE III.

LXIV. The rules as to them are like the rules concerning the first class (by which) it is meant that he of them who is nearest to the deceased, on whichever side he may be (related), is first entitled to the inheritance (*j*).—Sirájiyyah, page 49. *Principle.*

(*j*.) That is, whether he be the nearest by the father's side, or by the side other than that of the father. Consequently, the daughter and son of a paternal aunt are preferable to the daughter of a daughter of the paternal aunt, or the son of her daughter, or the daughter of her son; because in relation to the deceased the former two are nearer than the latter, although related by the same side; and the daughter and son of a maternal aunt are preferable to the daughter of a daughter of the maternal aunt, and the son of her daughter, for the same reason as above-mentioned. In like manner, the children of a paternal aunt are preferable to the children of a maternal aunt, by reason of the former being the nearer though the sides of relationship be different.—Sharífiyah, page 123. Explanation.

LXV. If they be equal in relation (to the deceased,*) and the side of their consanguinity be the same, (so that the relation of all of them be through the deceased's father, or mother,*) then he who has the strength of blood, is preferred by the general assent (to him who has not the strength of consanguinity*).—Sirájiyyah, page 49. *Principle.*

Thus, if a person leave three children of different paternal aunts, the whole of the property will go to the child of the paternal aunt of the whole blood; in default of him or her, the whole will go to the child of the paternal aunt by the father's side; failing him or her, the whole will go to the child of the paternal aunt by the mother's side. Such is also the case with the children of the different maternal Illustration.

* Sharífiyah, page 123.

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uncles, and of the different maternal aunts. It has been already stated that in the matter of inheritability by means of relation as residuary, the father's relation is preferable to the mother's relation.—Sharífiyah, page 123.

Principle. LXVI. If they be equal (in degree and also in blood,*) and the side of their consanguinity be the same, (so that all of them be by the father's side, or by the mother's side,†) then the child of a residuary is preferred, (to him or her who is not the child of a residuary.†)—Sirájiyyah, page 49.

Example. As (if there be) a daughter of a paternal uncle, and a son of a paternal aunt, both of them by the same father and mother, or by the same father only, then the whole of the property goes to the daughter of the paternal uncle (because she is the child of a residuary, whereas the son of the paternal aunt is not so).—*Ibid.*

Principle. LXVII. If one of them two (that is one of the paternal uncles and aunts aforesaid‡) be by the same father and mother, and the other by the same father only, (then) according to the clearer (or more approved) tradition, all the estate goes to the person who has the strength of consanguinity, and this, by analogy, to the maternal aunt by the same father only; (for) though she be the child of a distant kindred (namely, mother's father,‡) yet she is preferred on account of the strength of consanguinity, (which she has by the father's side,‡) to the maternal aunt by the same mother only, though she be the child of an heir (namely, the mother's mother, who is an heir,‡) since the weight which prevails by itself, that is, the strength of consanguinity, is greater than the weight by another, which is the descent from an heir.—Sirájiyyah, page 49.

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* Sharífiyah, page 123.
† Sharífiyah, page 124.
‡ Sharífiyah, page 124.

Some of them (the Learned) say that (in the above-mentioned case*) the whole of the estate goes to the daughter of the paternal uncle by the same father, since she is the daughter of a residuary (and not to the son of the paternal aunt, he being the issue of a distant kindred*).—Sirájiyyah, page 49. LECTURE III.

LXVIII. If they be equal in degree, yet the place of their relation differ (viz., if some of them be by the father's side, and others by the mother's side,*) then, according to the clearer (*i.e.*, more generally known) tradition, they have no regard (shown) to the strength of consanguinity, nor to the descent from a residuary, by analogy to the paternal aunt by the same father and mother; for, though she have two bloods, and be the child of an heir on both sides (that is, by the sides of father and mother, and their father be a true grandfather and a residuary, and their mother, a true grandmother and a sharer,*) yet she is not preferred to the maternal aunt by the same father, but two-thirds go to whoever is related by the father (because he is in his place,*) and *there* (that is, in the case of there being persons related on the father's side and equal in degree,*) regard is to be shown to the strength of blood, then to the descent from a residuary; and one-third goes to whoever is related by the mother (as he stands in her place,*) and *there* also regard is shown to their strength of consanguinity (according to the same analogy as you have known in the case of the persons related by the father*). Then, according to Muhammad, the property is distributed among the individuals by the first line that differs, with attention to the number of the branches, and of the sides in the roots (*k*), as in the first (*l*).—Sirájiyyah, pages 47 & 48. *Principle.*

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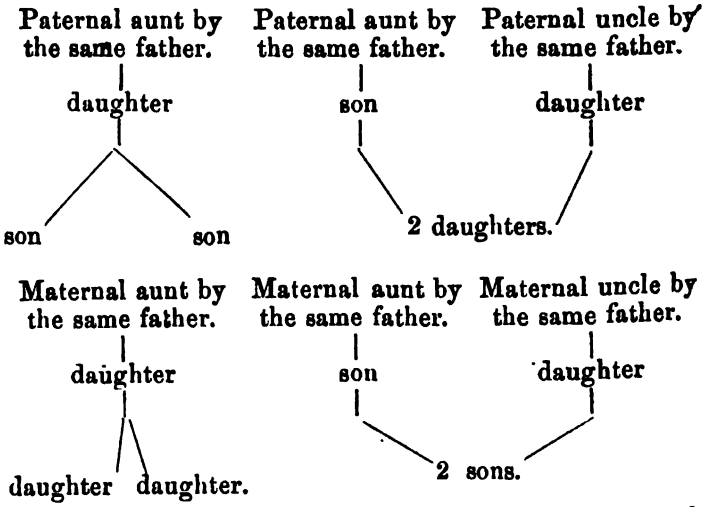
* Sharífiyyah, pages 125—127.

Explanation. (*k*). Accordingly, the child of a paternal aunt by the same father and mother is not preferred to the child of a maternal uncle or aunt by the same father and mother, owing to there being no strength of consanguinity in the child of the paternal aunt. In like manner, a daughter of a paternal uncle by the same father and mother is not preferred to the daughter of a maternal uncle or aunt by the same father and mother, no regard being shown on account of the paternal uncle's daughter being the child of a residuary.—Sharífiyyah, page 126.

Illustration. (*l*). Thus if we suppose the deceased left two sons of a daughter of a paternal aunt by the same father only, and two daughters of a son of a paternal aunt by the same father only, who also are the daughters of a daughter of a paternal uncle by the same father only, and he left with them two daughters of the daughter of a maternal aunt by the same father only, also two sons of the son of a maternal aunt by the same father only, who also are the sons of a daughter of a maternal uncle by the same father only, in this form :—



Here the root of the case is three, two-thirds of which (=2) go to the relations by the father, and one-third (which is one) goes to those related by the mother, and this case is arranged by thirty-six; because the property is divided according to the generation where the difference first occur-

red; and regard is to be had amongst them according to the number of branches and sides; consequently, the uncle by the father's side must be reckoned as two uncles, and these, as four paternal aunts, and each of the two paternal aunts by the same father, as two paternal aunts: thus the total amounts to eight paternal aunts; and if the number of the persons be reduced, the paternal uncle who is equal to four paternal aunts is reduced to one paternal uncle, and the remaining four (are reduced) to another paternal uncle; after this, one of the two-thirds (=2) is given to each of the uncles. And out of the set (of relations) by the mother's side, the maternal uncle by the same father is reckoned as two maternal uncles, who are as four maternal aunts, and each of these two maternal aunts are reckoned as two maternal aunts upon the ground of regard being shown to the branches and sides in the roots.*—Sharífiyyah, page 127.

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* Consequently, here also there are on the whole eight maternal aunts; and when the number of persons be reduced, the maternal uncle, who is (equal to) four maternal aunts, becomes one maternal uncle, and the remaining four maternal aunts become another maternal uncle; but what they got from the root of the case is one-third (equal to one) which cannot be divided between these two maternal uncles without a fraction; the number of these two, therefore, is multiplied into the root of the case, which is three, and the product gained is six; then, out of this six, four are given to the set by the father's side, and two out of the said four are given to the paternal uncle by the father, and he is made a separate party, and (then) his portion is given to his last branch: I mean, the two daughters of his daughter, and thus one is (allotted) to each of them two, and the remaining two of the four are given to the two paternal aunts by the father's side, and their persons are arranged in one class or set. Then we look to those below the two paternal aunts, and find one son equal to two sons, and one daughter equal to two daughters, by reason of their number being taken from (that is reckoned according to) their branches; and if they be reduced to individuals, the two daughters are made (i. e., reduced to) one son. Thus the total amounts to three sons. Now the portion of the two paternal aunts, which amounts to two, cannot be divided among three (without a fraction), nay, there is disagreement between them; consequently, the (portion amounting to) three is left as it is; and two out of the (said) six are given to the set by the mother's side, then out of this two, one is given to the maternal uncle, and he is made one set (or party), and the other one (is given) to the two maternal aunts, and they are made one set; and when the maternal uncle's portion, which is one, is given to the two sons of his daughter, the same cannot be divided between them (without a fraction); consequently, the number of those two is left as it is. Now if we look (to the persons) below the two maternal aunts, we find one son equal to two sons, and one daughter equal to two daughters, and if they be reduced (to individuals), the total would amount to three sons; but one cannot be divided amongst them (without a fraction); consequently, we leave three as they were. Then if we look to the number of the persons,—I mean, 3, 2,

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Then this rule (that is, the one which is mentioned in full with respect to the paternal uncles and aunts, and maternal uncles and aunts, of the deceased, and their children,*) is applied to the sides of the paternal uncles and aunts of his parents, and their maternal uncles and aunts; *then* to their children; *then* to the side of the paternal uncles and aunts of the parents of his parents, and to their maternal uncles and aunts; and *then* to their children, as in the case of residuaries (*m*).—Sirájiyyah, Arabic, page 130.

(*m*.) That is to say, if there be found no paternal uncle and aunt, and maternal uncle and aunt of the deceased, or their children, the rule aforesaid is applied to the deceased's father's paternal uncle by the same mother only, and his paternal aunt, maternal uncle and maternal aunt,

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and 3,—we find equality between three and three, and we are contented with one of those two (threes,) and finding disagreement between two and three, we multiply one of them into the other, and gain six; then we multiply this six into that six which is the root of the case, and the product is 36, by which the case is arranged:—the set by the father's side had four out of the root of the case; now if the same be multiplied into the multiplicand, which is six, the product is twenty-four, which is the portion of this set out of thirty-six. But as to the portion of each of them out of the same, we say that if the portion (=2), which the two daughters of the daughter of the paternal uncle by the same father had on account of the uncle, be multiplied into the multiplicand, it will amount to twelve; consequently, each of those two will have six; and if the portion (=1), which those two had on account of the paternal aunt, be also multiplied into the multiplicand aforesaid, it will amount to six; consequently, those two will have three each: thus each of those two will have nine shares,—six by relation to the paternal uncle, and three by relation to the paternal aunt. In like manner, if the portion (=1) of the two sons of the daughter of the paternal aunt be multiplied into the said multiplicand, it will amount to six, of which, three is for each of those two. The total of these shares amounts to twenty-four. The set by the mother's side had two out of the root of the case, and if we multiply the same into the multiplicand, which is six, the product is twelve, which is the share of this set out of thirty-six. But as regards the share of each of them, we say, if the portion (=1) of the two sons of the daughter of the maternal uncle be multiplied into the mutiplicand, which is six, it will amount to six, then each of those two shall have three; and if the share (=1) of the branches of the two maternal aunts be also multiplied into this multiplicand, it would amount to six, then the two sons of the maternal aunt's son will have four out of the six,—two each. Thus each of the two sons has five,—three on account of relation to the maternal uncle, and two on account of relation to the maternal aunt; and out of that, the two daughters of the daughter of the maternal aunt will have two,—one each; and ten will be allotted to the two sons, and two to the two daughters, the total of these shares amounting to twelve; and if we add this to twenty-four, the grand total will be thirty-six.—Sharífiyyah, pages, 127—130.

* Sharífiyyah, page 130.

and to the deceased's mother's paternal uncle, and her paternal aunt, maternal uncle and maternal aunt. Now should there be only one of them, he or she would take the whole property by reason of there being no (other) claimant; but if there be many, and the side of their relation be one and the same, then the strongest by relationship is preferred, whether such person be a male or female; and if the (degree of their) relationship be equal, then the male has the portion of two females; but if the sides of their relationship be different, then the person related by the father will have two-thirds, and the person related by the mother will have one-third. If these be not in existence, then the rule applicable to their children is the same as that to the children of the fourth class. But if their children also be not in existence, then the rule in question is applicable to the paternal uncles and aunts and the maternal uncles and aunts of the deceased's parents, then to their children; and so on *ad infinitum*. And it is indicated by the author's dictum 'as in the case of residuaries,' that the succession of the distant kindred is regulated by regard being had to that of the residuaries, as has been already explained; consequently (the rule for) the succession of the residuaries is actually followed (in the case of distant kindred). And when the succession of the residuaries is known, the rule (for the paternal uncles of the deceased) is applied to the paternal uncles of his (the deceased's) father, then to those of his (the deceased's) paternal grandfather; such is also the case with those who are in the meaning of the residuaries (*i.e.*, governed by their rules for succession).—Sharífiyyah, page 130.

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ON PREGNANCY AND THE FŒTUS—MISSING PERSONS—CAPTIVES—AND PERSONS PERISHING BY A COMMON ACCIDENT.

Principle. **LXIX. The longest time of pregnancy is two years according to Abú Hanífah and his companions.* And the shortest time for it is six months (*a*) according to all the doctrines.†**

(*a.*) In the Hadís of Ibnu Masúd it is stated that four months after conception the fœtus has vitality, then in two months more its formation becomes completed. So, in the sixth month, the fœtus, complete in its person, may come out (of its mother's womb). This is stated by Shams-ul-Aimma Sarakhsí in his commentary on the book of Divorce.—Sharífiyyah, page 138.

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lxix. The longest time of pregnancy is two years according to the tradition reported by Ayeshah (one of the wives of the Prophet). According to the other three *Imáms* (Sháfií, Málik, and Hambal,) it is four years.—Durr-ul-Mukhtár, page 282.

It is three years according to Layis (or Layith,) the son of Saád al-Fahmí; and seven years according to Zahrí.—Shirájiyyah, page 52.

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* Shirájiyyah, page 52.

† Durr-ul-Mukhtár, page 282. Sirájiyyah, page 52.

With respect to the shortest period of gestation, the Muhammadan law is the same as the Roman, and upon this point the doctors of all sects seem to be agreed. But there is less unanimity regarding the longest period, though the notions entertained by all on the subject will probably excite the smile of a European Physiologist. They form, however, a part of the Muhammadan code, and cannot well be entirely disregarded by our courts of justice without altering the law which they are bound to administer in some cases, and assuming in so far the functions of the legislature.—B. M. L., page 156.

According to Sháfií, the period of gestation may be extended to four years; and two cases apparently well authenticated, of persons who are said to have remained so long in their mothers' wombs are cited in support of his opinion. With respect to these cases, the author of the Sharífiyyah pertinently observes, that the parties could neither have known the fact themselves, nor have well been informed of it by others, since none but God

Khassáf reports from Abú Yusuf that—

LXX. There should be reserved (for the fœtus) the share of one son, or of one daughter; and *Principle.*

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lxx. A child in the womb inherits; and a share must be reserved for him, according to all our masters, which he is entitled to if born alive within two years.*—Fatáwá Alamgírí, vol. vi, page 633.—*Vide* B. Dig., page 702.

himself can tell what takes place in the womb. Moreover, the protraction might have been occasioned by an unusual rigidity of the mouth of the uteras, induced by disease, and so rare an occurrence cannot be drawn into a precedent. The opinion of Abú Hanífah seems to rest on less questionable grounds. He assigned two years as the longest period of gestation, on the authority of Ayesha, one of the Prophet's widows, who expressly declared, that "a child remains no longer than two years in the womb of its mother, even so much as the turn of a wheel." And this she delivered, not as her own opinion, but as a saying of the Prophet himself. It is, therefore, entitled to the same implicit respect as any other of the traditions, and is accordingly so observed by all the sect of Abú Hanífah,—B. M. L., page 157.

Disbelieving entirely in all reports of extraordinary protraction, we may be apt to suppose that, notwithstanding the latitude allowed by the Muhammadan law, the only difference which can exist between its practice and that of European nations is, that questions of pregnancy may be entertained in the former as worthy of investigation, which would be entirely rejected in the latter. If our notions on the subject be correct, and the investigation be fairly conducted, the practical result ought to be nearly the same. The issue of an investigation, however, must depend in some degree on the spirit in which it is pursued; and we should not be surprised if a much less degree of evidence would satisfy a Muhammadan lawyer upon a point of this nature, than would be required to command the belief of an English jury. There are still facts, such as the external symptoms of pregnancy, which cannot be entirely disregarded; and it can hardly be supposed, if a woman should fail to exhibit any of these signs at the usual time, reckoning from her husband's death, that any child which she might ultimately produce within two years from that period would still be pronounced legitimate even by a Muhammadan lawyer. His law allows that the usual period of gestation may in some cases be protracted so long; but it does not allow, so far as I have been able to discover, that pregnancy may possibly exist without any of the symptoms by which it is usually distinguished. There would thus be still a fact in most cases to be accounted for, as contrary to Muhammadan experience as to our own. It seems therefore probable, that the only instances where any real difficulty can occur, are those rare cases of disease which occasionally perplex even the most skilful of the medical faculty in Europe.—B. M. L., pages 156—159.

* This has reference to a posthumous child. But if the child's father be alive, as for instance, if the deceased has left a mother pregnant by another man than his father, and she is delivered of a child at more than six months from the day of his death, the child does not inherit, unless the other heirs acknowledge that his mother was pregnant at that time; because it is possible that he may have been conceived subsequently. But if the child is born at six months, he does inherit.—B. M., page 702.

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according to this, decisions are made: security, however, must be taken according to his opinion (*b*).—Sirájiyyah, page 45.

Reason.

Because, generally, a woman, by one gestation, does not bring forth more than one child; consequently, decisions must be passed thereupon until the contrary is ascertained.—Sharífiyyah, page 138.

Explanation.

(*b*.) That is, according to the opinion of Abú Yusuf, as stated by Khassáf, the Kází (judge) will take security from them (*i. e.*, the heirs) for the matter known (to all), that is for a portion exceeding one son's share.—Sharífiyyah, page 139. *Vide* page 181 *et seq.*

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lxx. There should be reserved for the fœtus the share of one son, or of one daughter, whichever of the two is the most; and according to this, decisions are given, the same being the most consistent: security, however, must be taken as a precautionary measure.—Durr-ul-Mukhtár, page 871.

Abú Yusuf, on the other hand, according to the more generally received accounts of his sentiments, considered, that no more than the share of one son, or the share of one daughter, can be properly reserved for an infant in the womb; security, however, being taken from the other heirs to refund in case of there proving to be more than one child. And the reasonableness of this opinion has recommended it to the approbation of the Learned by whom it has been generally adopted as the rule of decision.—B. M. L., pages 161, 162.

Where a person dies leaving his wife pregnant, and he has sons, the share of one son must be reserved in case a posthumous son should be born.—Macn. M. L., Chap. I, Sec. i, Princ. 103.

When a person dies leaving an heir, whose share is not at all changed or affected on account of pregnancy, then his or her share must be given (in full); as when a person leaves a grandmother and a pregnant wife (him surviving,) then a (full) sixth must be given to the grandmother. In like manner, when he leaves a pregnant wife and a son, then an eighth (complete) goes to the wife. But if the heir be such as is excluded in one of the two cases of pregnancy, then nothing will be given to him or her, by reason of his or her right being doubtful; and an heir does not inherit when his or her right is doubtful, as when a person dies leaving a pregnant wife, a brother and a paternal uncle, then nothing goes to the brother and uncle, because it is probable that the embryo

The share of one son, as above directed, is, however, to be reserved in the case of the fœtus (when born alive) being only a participator with other heirs, and neither a total nor a partial excluder,—as when the deceased left sons, daughters, and a pregnant widow. But,—

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LXXI. If the child be a total excluder of all the heirs (as a son for instance), and the other heirs be (the deceased's) brothers or sisters or paternal uncles, then the whole estate must be reserved to abide the event of his birth. If only some of the heirs are excluded, (as when there is a grandmother and brother,) then the grandmother's sixth is to be given to her, and the remainder of the estate reserved. If the child be only a partial excluder, (as when there is a husband or wife, besides him,) the smaller of the shares to which the party may be entitled is to be given to him or to her, and the remainder to be reserved. And if the heirs are persons who are subject not even to partial exclusion (as a grand-

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would be born a son, (and being so, he would exclude them both).—Sharifiyyah, page 144.

If the pregnant woman be the widow of the person whose succession is in dispute, the child should inherit, if born within two years from such person's decease, unless the woman has acknowledged the completion of her *iddat*, which would be tantamount to an admission that she was either not pregnant at the death of her husband, or had been intermediately delivered of another child. While if she were the widow of a relative of the deceased, as of his father or son for instance, it is necessary that she should be delivered within six months from his death, in order that her child may participate in his inheritance. The reason assigned by the commentator for this distinction, is the necessity of finding a legal descent for the infant in the first instance; while in the second, his paternity being already established, and the question reduced to one of mere inheritance, it is necessary to establish his existence in the womb at the death of the party from whom he claims to inherit, and that can be predicted with certainty only when he is born at, or within, the shortest period of gestation, reckoning from that event.—B. M. L., pages 159, 160.

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father and grandmother,) then their full shares are to be given to them, and the remainder to be retained.—Fatáwá Alamgírí, vol. vi, page 633.—*Vide* B. Dig., page 702.

Principle. LXXII. If the pregnancy was by the deceased, and the widow gave birth to a child at the full term of the longest period (allowed) for pregnancy,* or at a shorter period, (that is shorter than the longest period allowed for pregnancy, be the same six months or less, or more,†) and the woman hath not confessed her having broken the legal term of *iddat*‡ or abstinence (*c*), that child shall inheri tfrom the deceased, and the others shall inherit from him.—Sirájiyyah, page 53.

Explanation of *iddat.* (*c.*) The period of abstinence in (the case of) death is four months and ten days, and this for all females excepting slaves, to whom is given half of the period allowed to free women. But for a pregnant woman, though a slave, it extends to the time of her delivery.—Durr-ul-Mukhtár, page 275.

Reason. Because the existence of the fœtus in the womb at the time of (the deceased's) death is a necessary condition for its being entitled to the inheritance; consequently, if the woman hath not confessed her having broken the legal term of abstinence (*iddat*‡), it must be decided that she was pregnant at the time (of her husband's death).—Sharífiyyah, page 140.

Principle. LXXIII. But if she produce a child after the longest period of gestation, it shall not inherit, nor

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* "Which," says Sharíf, "is two years according to our doctrine, and four years according to Sháfii."—Sharífiyyah, page 140.

† Sharífiyyah, page 140.

‡ '*Iddat*' is the condition of a woman when it is unlawful to have carnal connection with her, as when she is divorced, or mourning the death of her husband. The term of *iddat* on death is, in general, four months and ten days (for women who are free), but that for a female slave is half of that period.

shall it be inherited (by the relations of the deceased).* And if it is known that the child so born was begotten *after* (the deceased's) death, then such child is neither a relation, nor a successor (of the deceased).† LECTURE IV.

In like manner, if a pregnant woman declares after a time (when the *iddat* may be assumed to have elapsed,) that the time of her *iddat* has expired, and then she brings forth a child within such period (as above,) such child shall not inherit, nor shall it be succeeded to (by the relations of the deceased); inasmuch as it is known from the woman's own declaration that the child was not begotten by the deceased.—Sharífiyyah, page 140.

LXXIV. If the child is born dead, it does not inherit; this, however, is to be understood of a regular delivery; but if violence has been done to the mother,—as, for instance, if she has been struck on the belly, and has cast her progeny,—such progeny is to be regarded as an heir. For the law imposes a liability on the striker, and liability is incurred only for an offence against the living, not against the dead.—Fatáwá Alámgírí, vol. vi, page 634. *Vide* B. Dig., page 703. *Principle.*

LXXV. When, therefore, we presume the child to have been alive, it is entitled to its share in the inheritance, and the share can be inherited from it (by its heir) in the same way as the exchange for its life is inherited from it, and that is the fine.—*Ibid.* *Principle.*

Now the way of knowing the life of the child at the time of his birth is, that there be found in him *that*, by which life is proved; as a voice, or sneezing, or weeping, or smiling, or moving a limb. And if the smallest part of

* Sirájiyyah, page 53.
† Sharífiyyah, page 140.

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the child come out, (and it make any of those signs,*) and then die, it shall not inherit; (for when the greater part of its body is dead, the whole of it must be taken to be dead; consequently it shall not inherit*); but if the greater part of it come out, and then it die, it shall inherit: and if it come out straight, (that is with its head first,*) then its breast is considered, (by which it is meant that, if the whole of its breast come out, and the child be alive, it shall inherit; because the greater part of it was alive*); but if it come out inverted, (that is with its feet first,*) then the navel is considered, (for if his navel come out, and the child be alive, it shall inherit, because the greater part of it came out alive, and if the navel does not come out, it shall not inherit.*)—Sírajiyyah, page 53. Thus—

Principle. LXXVI. A child will inherit if the greater part of its body is protruded with vitality indicated by any of the acts or signs above mentioned.†

Reason. "Because," says Sharíf, "the same rule is applicable to the case of the greater part (coming out) as to the case of the whole (body coming out;) so (in the case of the greater part coming out) it must be supposed as if the whole of his body came out alive. And the root of this is what is related by Jábir from the Prophet, who said: "If the child move, it shall inherit, and prayer shall be read for him (on his death)." The rule (of regulating the inheritance) is, however, in consideration of the greater or less portion of its body coming out; as is laid down by the author.—Sharífiyyah, page 140.

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lxxv & lxxvi. When a child is born alive, he acquires a vested interest, which passes to his representatives in the event of his death. If that should occur immediately after delivery, it may be a question of difficulty to determine whether the infant was actually born alive or not.†—B. M. L., page 160.

* Sharífiyah, page 140.

† The Muhammadan law has provided for cases of this kind, with a minuteness which is perhaps unknown to other systems of jurisprudence. If the infant exhibits any of the signs by which life is usually indicated, as a sound, sneezing, weeping, laughing, or the motion of a limb, it is to be

LXXVII. The chief rule in arranging cases on pregnancy is, that the case be arranged by two suppositions, that is by supposing that the child in the womb is a male, and by supposing that it is a female: then, compare the arrangement of the two cases, and if those two agree in any part, then multiply the measure of one of the two into the whole of the other; and if they disagree, then multiply the whole of one of the two into the whole of the other, and the product will be the arranger of the case: next multiply the allotment of him, who would have something from the case which supposes a male, into that of the case which supposes a female (in the instance of its being a case of disagreement,*) or into its measure (in the instance of its being a case of agreement,*) and then (multiply also the allotment*) of him who takes something *Principle.*

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According to Fatáwá Alamgírí, however, the child will inherit if half, and not less than half, of its body is protruded with vitality, or if its head is presented and breast protruded with vitality.—The passage to this effect (contained in the said work), is as follows:—

If the child is born dead, he does not inherit, and there is no other legal effect or consequence. The signs of life are breathing, making a sound, sneezing, weeping, laughing and making motion, as of the eyes or hands. If half of the child is protruded alive and it then dies, it is entitled to inherit, but not if less than half be protruded. When the head is presented and the breast is protruded, while the child is still living, it inherits; but if the feet are presented, regard is to be had to the navel.—Fatáwá Alamgírí, page 634.—B. Dig., page 703.

accounted alive. And if it should die in the birth, the vestiture of interest will depend on the fact of the greater or smaller portion of the body being delivered before death. In cases of natural labor, where the head is presented, the breast is to be considered, that is, the infant shall inherit if the whole breast be delivered while he yet discovers signs of life; but if the feet are first delivered, the navel is to be taken into consideration, and his right of inheritance will depend on so much of his body being protruded while he is yet alive.—B. M. L., pages 160, 161.

* Sharífiyyah, page 141.

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on the supposition of a female, into the case of the male or into its measure (as the case may be one of disagreement or agreement,*) then examine the two products of those multiplications; and whichever of the two is the less, that shall be given to such an heir; (because his title to the less is determined;*) and the difference between the two (products) must be reserved from the allotment of that heir; (because there exists a doubt whether the party entitled to the difference is the child in the womb, or another than itself; consequently it must be reserved so long as the doubt is not removed.*) When the child appears, (and the doubt is removed,*) then if it be entitled to the whole of what has been reserved, it is well; but, if it be entitled to a part, let it take that part, and let the remainder be distributed among the (other) heirs, and let there be given to each of those heirs what was reserved from his or her allotment.†—Sirájiyyah, page 53.

Example. As, when a man has left a daughter, both his parents, and a wife pregnant, then the case (is arranged) by twenty-four, on the supposition that the fœtus is a male (*d*), and by twenty-seven, on the supposition that it is a female (*e*).—Sirájiyyah, page 54.

Reason. (*d.*) Because, in this case, one-eighth, two-sixths and the rest occurred together; consequently, that one-eighth = 3 went to the wife, and one-sixth = 4 went to each of the parents, and the remainder =13 went to the daughter and the fœtus on the supposition of his being a male.—Sharífiyyah, page 141.

Reason. (*e.*) Because, in the case in question, an eighth, two-sixths and two-thirds occurred together on the above sup-

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* Sharífiyyah, page 141.

† In arranging the case of pregnancy, the property must be divided into so many parcels as will allow of all the heirs' receiving their portions without a fraction whether the infant should prove to be a male or a female.—B. M. L., page 162.

position; consequently, the case is (called) a *Membariyah*, and (the root of the case) is increased from twenty-four to twenty-seven (*vide* Increase), out of which eight go to the parents, three to the wife or widow, and sixteen to the daughter and the fœtus. And between the two numbers of the arrangement of the two cases (that is, between twenty-four and twenty-seven) there is an agreement in third, because it is denominated from three, which measures or exhausts them both.—Sharífyyah, page 141.

Now, if the measure of one of the two (that is, a third which amounts to eight in the first case, and nine in the second case,*) is multiplied into the whole of the other, the product amounts to two hundred and sixteen (parts,) by which number the case will be settled. For, on the supposition of the embryo being of the male sex, the wife takes twenty-seven, and the two parents thirty-six each(*f*); but on the supposition of its being female sex, the wife has twenty-four (*g*), and each of the parents thirty-two (*h*). So (out of two hundred and sixteen shares*,) twenty-four are given to the wife (*i*), and three (*viz.*, the difference between the two portions,*) from her allotment are reserved (until the sex of the embryo is discovered;*) and from the allotment of each of the parents are reserved four shares, (that is, out of the above-mentioned number, thirty-six, the smaller portion, which is thirty-two, is given to each of them, and the difference between the two shares is reserved, the fœtus being taken, in the case of there being a wife and both parents, to be of the male sex,*) and thirteen shares are given to the daughter; since the portion reserved in her right is the allotment of four sons, according to Abú-Hanífah (*j*), and when the sons are four, then her allotment is one share and four-ninths of a share (*k*) out of four and twenty (the root of the case on the supposition of a male; and this portion is*) multiplied into nine (which is the measure of the number of the arrangement come to on the supposition of the fœtus being a female*), and that (*i.e.*, the product of this multiplication*) amounts to thirteen shares, which are hers (out of two hundred and sixteen,*) and the residue, which amounts to one hundred and fifteen (shares), is reserved.—Sirájyyah, page 54.

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* Sharífiyyah, page 141.

Reason. (*f.*) Because, out of twenty-four, which form the root of the case on the supposition of male sex, as already known to you, the portion of the wife is three, and when you multiply it into nine, the measure of twenty-seven (the divisor on the supposition of the female sex,) the product is twenty-seven; and the allotment of each of the parents is four on the supposition of male sex: now if we multiply it into the said measure, the product is thirty-six.—Sharífiyyah page 142.

Reason. (*g.*) Because out of twenty-seven, the divisor, on the supposition of the female sex, was also three; now if this is multiplied into eight, the measure of the divisor (24) on the supposition of a male, the product is twenty-four.—*Ibid.*

Reason. (*h.*) Because, out of the divisor of the case of (the fœtus being) a female, the share of each of them was also four; now if we multiply this into eight, the measure of the divisor in the case of a male, the product is thirty-two.—*Ibid.*

Reason. (*i.*) Because, that is her smallest allotment on the supposition of the fœtus being a male as well as a female.—*Ibid.*

Reason. (*j.*) Because, according to his doctrine, this is her smallest allotment on the supposition in question, and not on the supposition of four daughters.—Sharífiyyah, page 142.

Reason. (*k.*) Because, when, out of the residue, two shares are given to each of the sons and one share to the daughter, there remain four shares, then another share short of one-ninth goes to each of the sons: thus the daughter gets one entire share and four-ninths of a share.—Sharífiyyah, page 143.

And if the widow bring forth one daughter, or more, then all of what was reserved (goes) to the daughters (*l.*)—Sirájiyyah, page 54.

Reason. (*l.*) Because, (here) the embryo is considered a female with regard to the wife, and both parents; and a share is given to each of them in proportion to what is receivable by them on consideration of the embryo being a female: and when in consideration of female sex they have received their full allotments out of what remained after (the allot-

ment) of their portions, then the whole amounting to one hundred and twenty-eight constitutes the share of the two or more daughters.—Sharífiyyah, page 143.

But if she bring forth one son or more, then must be given to the widow and both parents what was reserved from their shares (*m*), and the residue (*n*) shall be divided among the children (*o*).—Sirájiyyah, pages 54 & 55.

(*m*.) That is, the three (parts) which were reserved for the wife out of her share would be given to her in the case of the embryo being a male: so here her allotment is complete, the same amounting to twenty-seven, which is the highest of the two shares; and to each of the parents must be given the four which were reserved out of his or her share in the case of the embryo being a male, thus the largest share, which is thirty-six, is completed for each of them.—Sharífiyyah, page 144.

(*n*.) That is, the hundred and four (parts) which remained after giving to those three and to the daughter their respective allotments, and to the above is added thirteen which were taken by the daughter in order that the number one hundred and seventeen might be had (completed).—Sharífiyyah, page 144.

(*o*.) If the same quadrate with them, the division must be made among them according to the rule—"the male has double the portion of a female;"—but if the shares be fractional, then the case will be arranged according to the rule which has been repeatedly laid down for you.—Sharífiyyah, page 144.

And if she (the pregnant widow) bring forth a male and female child, then the result is the same as in the case of bringing forth a male child. The case is already known to you.—*Ibid.*

But if she bring forth a dead child, then there must be given to the widow and both parents what was reserved from their shares, and to the daughter a complete moiety, which is (completed by) ninety-five parts more (*p*), and the remainder, which is nine shares (out of a hundred and four), goes to the father, since he is the residuary (*q*).—Sirájiyyah, page 55.

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(*p.*) For she had already received thirteen, and here her half share in the inheritance (amounting to) hundred and eight is completed.—Sharífiyyah, page 144.

(*q.*) As has been already mentioned, that is 'a legal share, and a residuary portion also,' and that with a daughter or daughters.—*Ibid.* See *ante*, p. 95.

It is to be known, however, that, when a person dies leaving an heir, whose share is not at all changed on account of pregnancy, then his or her full share must be given;—as when a person leaves a grandmother and a pregnant wife (him surviving), then a full sixth must be given to the grandmother. In like manner, when he leaves a pregnant wife and a son, then an eighth complete goes to the wife. But if the heir be such as is excluded in one of the two cases of pregnancy, then nothing will be given to him or her by reason of his or her right being doubtful: and an heir does not succeed when his or her right is doubtful;—as when a person dies leaving a pregnant wife, a brother and a paternal uncle, then nothing goes to the brother and uncle, because, it is probable that the embryo would be a son (and being a son, he will exclude them both).—Sharífiyyah, page 144. *Vide* B. M. L., pages 165—169.

Principle. Of missing persons.

LXXVIII. A lost person (mafkúd) is he whose tidings are not received, and it is not known whether he is living or dead.—Sharífiyyah, page 144.

Traditionary opinions differ concerning the term or period until which a missing person must be considered to be alive, and after which he must be held to be dead.

ANNOTATIONS.

lxxviii. A person is missing when he has gone away, and it is not known where he is, or whether he is dead or alive.—Fatáwá Alamgírí, vol. vi, page 634.—B. Dig., page 703.

The lexicographical signification of the term *mafkúd* is 'lost,' and the legal signification thereof is—absent, or missing, or not known whether he is living and there is a hope of his returning, or whether he is dead; hence, the captive and apostate, not known to have, or not to have, taken refuge in a hostile country, are comprehended in the term mafkúd.—Durr-ul-Mukhtúr, page 402.

Hasan, the son of Ziyád, reports from Abú Haníffah, that the term is one hundred and twenty years from the day on which he (the lost) person was born; and Muhammad says, it is one hundred and ten years, while Abú Yusuf asserts it is one hundred and five years.* "The latter two traditions," says Sharíf, "are not, however, found in books of authority."† LECTURE IV.

LXXIX. According to the clearer tradition, (Záhir-ur-Rawáyit), when not one of his equals in age remains, judgment may be given of his death.—Sirájiyyáh, page 56, Arabic, page 144. *Principle.*

Then it is said by some that regard must be had to the equals (in age) of his own village or town, while it is said by others, that regard must be had to his equals (in age) in all the towns or villages. The former (of these opinions) is the most correct.—Sharífyyah, page 144. Again,—

LXXX. Some (of the learned) say, "ninety years;" and according to this opinion are decisions made.—Sirájiyyah, page 56. *Principle.*

ANNOTATIONS.

lxxix, &c.—Judgment will be given on his death with respect to his property, on the day, when it (*i.e.*, the death of his equals in age) is known, his wife will commence to observe the abstinence (*iddat*) on account of his death, his property shall be divided amongst his heirs, and judgment shall also be given on his death with respect to the property of another, from the time of his being missing; consequently, what was reserved for him will return to those who were the heirs of his ancestors at the time of his (ancestor's) death.—Durr-ul-Mukhtár, page 403.

lxxx. The writer, quoted in the Fatáwá Alamgírí, declares, with the Imám Timurtáshí, and perhaps on his sole authority, that the Fatáwá is according to this opinion; but he remarks, that the most general tradition is in favor of the other, which refers to the missing person's contemporaries. There is some difference as to the persons who shall be considered his contemporaries for this purpose; but by the most correct opinion they are contemporaries in his city.—B. Dig., p. 167.

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* Sirájiyyah, page 56.
† Sharífiyyah, page 144.

Reason. Because, beyond that, in our time, is very rare: consequently, the passing of the judgment, which is based on the generality of the term of human-life, cannot be delayed (beyond the same).—Sharífyyah, page 145. Thus,—

Principle. LXXXI. The death of a missing person unheard of is determined either upon the expiration of ninety years from his birth-day, or, when not one equal to him in age of the same village or town remains alive.

Although either of the above opinions (*viz.*, 1—A missing person is determined to be dead when not a single person of his native village or town who was equal to him in age is alive, or 2—when ninety years have elapsed from the date of his birth), is held to be the settled law, yet, in this country, Fatwás or legal opinions have been given by the law-officers and decisions passed according to the latter opinion,* perhaps upon the ground of its being the doctrine of the Hidáyah, to which preference is generally given.

It is laid down in the Hidáyah that—'if there be no evidence of his (the missing person's) being in life when

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* Mr. Baillie, however, in consideration of the great variety of opinions relative to the period at which the death of a missing person may be presumed, (*viz.*, Abú Hanífah allowed 120 years from birth, Muhammad 110, Abú Yusuf 105, while according to the Hidáyah it is 90 years,) suggests at page 167 of his Muhammadan Law of Inheritance, that, in all probability, in such a case, the judges might perhaps consider themselves at liberty to exercise their own discretion, a latitude which some of the followers of Abú Hanífah appear to have advocated.

But it is to be borne in mind that although the said Imáms respectively allowed 120, 110, and 105 years, yet decisions are not made according to the period allowed by any of them; on the contrary, when it is laid down by the authors of the Sirájiyyah and Sharífiyyah, the highest authorities of the Sunní doctrine as respects inheritance, that 'regard must be had to the equals (in age) of his own village or town,' or 'that the period to be allowed is ninety years from the day of his (the missing person's) birth,' and decisions are given by Kázís as well as foreign judges (see the precedents quoted), and the above are acquiesced in by the Hidáyah, the paramount authority of the Sunní sect, as well as by other works of authority, then foreign judges have no liberty to exercise the discretion suggested by the learned Compiler, inasmuch as the laws of the Muhammadans are sacred to them, and foreign judges have power only to administer them as they are, and not to frame any clause thereof. See preface to the Vyavastha Darpana, (2nd Ed.) page xxii, Note.

ninety years have elapsed, his portion, which has been so suspended, is then distributed among those who were heirs to the original proprietor at the period of his demise, as in the case of embryos in the womb. In the same manner, also, if a person make a bequest to a missing person, and the testator die, the bequest does not take place, but is held in suspense, because bequest stands upon a similar footing with inheritance.'—Hidáyah, vol. ii, page 293.

Precedents.

1. The law-officers of the Sudder Dewanny Adawlut declare, that, by the Muslim law, death of a missing person may be judicially presumed when *ninety* years from his birth have elapsed.

A decree, which committed part of the estate of an absent Muslim to his sister, with provision for eventual conversion of tenure by trust, into that of property, is reversed by the Sudder Dewanny Adawlut,—no eventual heritable right being found in the case to exist in the sister.—Mussammát Máni Bíbí *v.* Mussammát Sáhib-Zádí, Sel. Sudder Dewanny Adawlut Report, vol. v., page 108.

2. Four shares of it (the estate) should be deposited in the hands of a trustee, and the remaining three should be entrusted to the person or persons in possession of the rest of the property, to be kept until the re-appearance of the missing person. This period is *ninety* years, reckoning from his birth.—Part of case xiii, chap. i, of Macnaghten's Precedents of Muhammadan Law.

Some (of the learned in the law) say thus—"The estate of the lost person must be reserved for the final regulation of the Imám."*—This, however, is the doctrine of Sháfií, for he says:—

"When the term is passed, and the Kází determines, that persons like one lost do not live more than that period, judgment shall be given on his death, and his property shall be divided among his heirs who may be found existing at the time of passing the judgment."—Sharífiyyah, page 145.

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* Sirájiyyah, page 48.

Principle. LXXXII. A lost person is (considered as) living in (regard to) his own estate, so that no one can inherit from him,* and dead in (regard to) the estate of another, so that he does not inherit from any one; and his estate is reserved until his death can be ascertained, or the term (for a presumption of it) has passed over.†

ANNOTATIONS.

lxxxi, lxxxii. Such a person, according to our Shaikhs, is to be accounted alive so far as regards his own property, and dead as regards the property of others, until such a time has elapsed that it is conceivable that he should be still alive, or until his equals in age are dead, after which he is to be accounted dead with respect to his own property as from the day when such time is completed, or the last of his equals in age has died, and with respect to the property of others as if he had died on the day of his being missing.—Fatáwá Alamgírí, vol. vi, page 634.—B. Dig., page 703.

lxxxii. The property of a missing person is kept in abeyance for ninety years: His estate in this interval cannot derive any accession from the intermediate death of others, nor can any person who dies during this interval inherit from him.—Macn. M. L., Chap. I, Sect. x., Princ. 101.

lxxxii. He (the lost person) is alive in regard to himself, consequently, his wife cannot marry another, his property cannot be divided, and his ijaráh too must not be cancelled; but he is dead in regard to another, so that he shall not inherit from another (person).—Durr-ul-Mukhtár, page 403.

* Sirájiyyah, page 56.

† Durr-ul-Mukhtár, page 433; Sirájiyyah, page 56.

When one of the heirs is missing, that is to say, when he is absent, and there is no certain intelligence whether he be alive or not, he is considered as living with respect to his own estate, and as defunct with respect to the estate of others.

"Thus, if he had an estate when he disappeared, or if at that time he was entitled to a share in a joint property, such property cannot be inherited before his death be proved, or until he would have been ninety years of age, but must remain in trust until that time, when it will devolve on those of his heirs who are in existence at that time. On the death of any of the relatives of a missing person, to whom he is an heir, he is so far considered to be alive, that his share is set aside, but such share is not reserved in trust for him and his heirs, but delivered to the other heirs, who would have taken it, if he had

Accordingly,— LECTURE IV.

LXXXIII. Judgment (regarding a lost person) is suspended as to the right of another person, so that his (the lost person's) share from the estate of his ancestors must be kept, as in the case of pregnancy (*r*), and when the period has elapsed, and judgment is given of his death, then his estate goes to his heirs existing at the time of the judgment on his death, (and from amongst them, nothing goes to him who died before the passing of the judgment, by reason of the cause of the heritable being the survival of the heir at the time of the predecessor's death,*) and what was reserved for him (the lost person) from the estate of his ancestor, is restored to the (then) heir of that ancestor, from whose estate that share was reserved; since the lost person is dead as to the estate of another.†—Sirájiyyah, page 49. *Principle.*

(*r*.) For, in the case of pregnancy, if the fœtus comes out alive, it is entitled to its legal share, but if it comes out dead, the (other) heirs take what was reserved from their shares: Such also is the case in the present instance.—Sharífiyyah, page 145.

LXXXIV. If the lost person be one who excludes those who are forthcoming, they shall have *Principle.*

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been dead; if he returns after this, he will be entitled to his share; but if he does not return, it devolves on the heirs, who came into possession at the former distribution, but not to the heirs of the missing person.—Sirájiyyah. Hidáyah, vol. ii, page 293, Princ. M. L., pp. 92—116. Baillie's Inh., page 166. Elberling Latour's Judicial Maxims, page 354. (Note contained at page 398 of the Madras edition of Macnaghten's work on Muhammadan Law).

* Sharífiyyah, page 145.

† If a missing person be a co-heir with others, the estate will be distributed as far as the others are concerned, provided they would take at all events, whether the missing person were living or dead. Thus in the case of a person dying, leaving two daughters, a missing son, and a son and daughter of such missing son. In this case, the daughters will take half the estate immediately as that must be their share at all events; but the grandchildren will not take anything, as they are precluded on the supposition of their father's being alive.—Macn. M. L., Chap. I, Sec. X, Princ. 102.

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nothing, but the whole property shall be reserved; but if he (the lost person) does not exclude them, then to each of them shall be allotted what is smallest of his or her share, on the supposition of the existence of the lost person.—Sharífiyyah, page 145.

Principle. LXXXV. If the lost person make his re-appearance with vitality, he shall take what is his right; but if judgment has already been passed with respect to his death, then he is not entitled to any thing out of what was reserved for him.*—Sharífiyyah, page 145.

Principle. LXXXVI. The principle in arranging the cases concerning a lost person (is) that the case is arranged on a supposition of his life, and then arranged on a supposition of his death; and the rest of the operation (is) the same as we have mentioned in the chapter of pregnancy (*s*).—Sirájiyyah, page 49.

(*s*.) That is, the case of his life and that of his death must be looked to, and if they agree, the measure of one of the two must be multiplied into the whole of the other, but if they disagree, one of the two must be multiplied into the other, then the product of the multiplication in each of the two cases will settle the case in each of the two instances. Next, the share received by one, in the case of his death, should be multiplied into the share or the measure of the share which he received in the case of his life; and the share, which one received in the case of (the lost person's) life, should be multiplied into the case of his death or into the measure thereof. Then the products of those two multiplications must be looked to, and the smallest

* Any share in a succession which may open to him before a judicial declaration of his death, is to be reserved to await the possibility of his return. Should he return, it is of course to be transferred to him, and all his other property restored, which it is the duty of the Judge to place in the meantime under the custody of a proper officer. If he should never return, the principle of accounting him alive as to his own property, but dead as to that of others, comes into operation, for it is only such of his heirs as are alive at the time of the judicial declaration of his death, who are entitled to participate in his estate, while the portions reserved for him from the estates of others revert to their other heirs.—B. M. L., page 168.

of the two products shall be given to the heir who is forthcoming, and the difference between the two (products) shall be reserved from the portion of that heir until the condition of the lost person is known.—Sharífiyyah, page 146.

Illustration.

If (a woman) leave a husband, two sisters of the whole blood, all of whom are forthcoming, and a whole brother who is missing, then on the supposition of the lost person being dead, half goes to the husband, and two-thirds go to the two sisters; consequently, the root of the case is six, but this must be increased to seven, and on the supposition of his being alive, half goes to the husband without the case being increased, and a fourth to the two sisters, because the root of the case, upon this supposition, is two, of which, one goes to the husband, and one to the brother with the two sisters, which (one) cannot be divided amongst them without a fraction—they being as four sisters; four, therefore, must be multiplied into the root of the case, and the product gained will be eight, of which four will go to the husband, two to the brother, and the other two to the two sisters,—one to each of them: thus it is apparent that the death of the lost person is more advantageous to the two sisters than his life, while his being alive is advantageous to the husband, as in that case half of the property goes to him without increase. Consequently, the lost person will be considered alive with respect to the two sisters, and no more than a fourth part of the property must be allotted to them; and his death must be assumed in regard to the husband, and no more than three-sevenths of the property is to be allotted to him, and the residue must be reserved; and this case must be adjusted by fifty-six; because, the case arranged on the supposition of his being alive is eight, and that arranged on the supposition of his death is seven, and there being disagreement between these two, one of the two must, therefore, be multiplied into the other, and the product gained will be fifty-six. The husband had four in the case adjusted on the supposition of his being alive, and this, when multiplied into seven, (the root of the case on the supposition of his death), will produce twenty-eight; and he had three in the case settled on the supposition of death: this, multiplied into eight, (the root of the case adjusted on the supposition of his being alive,) will produce twenty-four; thus, twenty-four will be allotted to the

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husband, as that is the smallest of the two products, and is the half of the increased case, and four will be reserved out of his share. The two sisters had two out of the root of the case adjusted on the supposition of life, which, multiplied into seven, will give fourteen. And they had four out of the root of the case (adjusted) on the supposition of death, this (four) being multiplied into eight will produce thirty-two; consequently, the lowest of the two products, which is fourteen (=one-fourth of fifty-six) will be allotted to them, so seven will be allotted to each of them, and eighteen reserved from their shares. Thus, the whole of the shares allotted to the husband and the two sisters is thirty-eight; and the remainder of the fifty-six, which is eighteen, is reserved. But if it be known that the lost person is living, then the reserved four (shares) would be allotted to the husband to complete his half (=28 shares) of the estate, and the remainder, which is fourteen, will be for the brother, so that the other half of the estate will be divided between the brother and the sisters according to the rule—"the male has the share of two females." But if it be known that he is dead, then the eighteen (shares) which were reserved from the shares of the sisters will be given to them, so that four-sevenths of the estate, that is thirty-two (shares) be completed for them. But, as for the husband, he has already received his full share, that is twenty-four.—Sharífiyyah, pages 146, 147.

Precedent bearing on the principles lxxxii &c.

Held that, under the Muhammadan Law, a missing person is considered '*defunct*' with regard to others' property, and cannot inherit from others during the period allowed for his re-appearance.—Imám Alí Khán and others *v.* Abdul Alí Khán. The 7th of January 1867.—Agra High Court Reports, vol. ii, page 28.

Principle.

LXXXVII. When a company of persons (related to each other*) died, and it is not known which of

ANNOTATIONS.

lxxxvii. But when the times of their respective deaths cannot be known, then all of them will be inherited by their (respective) heirs who are living; since inheritance cannot devolve when there exists a doubt.—Durr-ul-Mukhtár, page 871.

* Sharífiyyah, page 150.

them died first (*t*), they are considered as if they died at the same moment, and the estate of each of them (goes) to his heirs (who are) living; and some of the deceased persons shall not inherit from others. This is the approved (opinion.)* This is also the opinion of Málik as expressed in the Muatta, and of Shafií.†

The above opinion was reported from Abú Bakr and Umar; and also from Zayīd the son of Sábit.—Sharífiyyah, page 150.

(*t*.) As while on board a boat, they were drowned together, or when they at once fell into a fire, or when a wall or the roof of a house fell on them, or they were slain in a battle, and it is not known who died first, and who died next or last.—Sharífiyyah, page 150. Example.

But Alí and Ibnu Masúd have, according to one of the two traditions from them, said that some of those (deceased

ANNOTATIONS.

When several persons have been drowned or burnt together, and it is not known which of them died first, "we" treat them as all having died together. The property of each will accordingly go to his own heirs. And the rule is the same when several are killed together, by the falling of a wall, or in a field of battle, and it is not known which of them died first.—Fatáwá Alamgírí, vol. vi.—page 635.—B. Dig., p. 704.

When relations perish together, as by the sinking of a boat, the fall of a house, or in common conflagration, and the exact times of their respective deaths cannot be ascertained, it is to be presumed that they all died at the same moment, and the property of each shall pass to his living heirs, without any portion of it vesting in his companions in misfortune.—B. M. L., page 172.

Where two or more persons meet with a sudden death about the same time, and it is not known which died first, it will be presumed according to one opinion, that the youngest survived the longest; but according to the more accurate and prevailing doctrine, it will be presumed that the death of the whole party was simultaneous, and the property left will be distributed among the surviving heirs, as if the intermediate heirs who died at the same time with the original proprietor had never existed.—Macn. M. L., Chap. I, Sect. xi, Princ. 106.

* Sirájiyyah, page 59. † Sharífiyyah, page 150.

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persons) shall inherit from others (*u*) except in what each of them has inherited from the companion of his fate, consequently, one will not inherit from his companion, as otherwise, it would follow that every one of them will inherit his own property, and there is no doubt that this is inadmissible.*—Sharífiyyah, page 151.

(*u*.) That is, the younger relatives will inherit from the elder ones.

Both (the above) opinions are supported by ingenious reasons, and the second is further recommended by its giving a larger portion of the estate to the nearer relatives; but there is only one tradition in favour of it, and the other is the more approved, and appears to be generally adopted by the followers of Abú Hanífah.—B. M. L., page 173.

Illustration.

The following case may be cited as an example of this rule. A, B, and C, are grandfather, father, and son. A and B perish at sea, without any particulars of their fate being known. In this case, if A, have other sons, C, will not inherit any of his property, because the law recognizes no right by representation, and sons exclude grandsons.—Macn. M. L., Chap. I, Sect. xi, Princ. 106. *Note.*

Further Illustration.

To illustrate these different opinions, let us suppose that two brothers perish together, each leaving a mother, a wife, a daughter and an emancipator, as his heirs, and an estate to the value of ninety dínárs. According to the more general opinion, the mothers would each take a sixth, or fifteen dínárs, the daughters, a half, or forty-five dínárs, and the emancipators, the remainder, or each thirty dínárs. According to the other opinion, the mothers and daughters would receive fifteen and forty-five dínárs respectively as before; but the remaining thirty of each estate would be presumed to have vested in the other brother, and would accordingly pass to his heirs. Thus the remainder of the elder brother's property would be divided among the mother, daughter, and the emancipator of the younger (brother); giving a sixth, or five dínárs, to his mother, a half or fifteen dínárs to his daughters, and the surplus or ten (dínárs) to his emancipator. The same thing would

* Not this, but the former, opinion is prevalent.

take place with respect to the remainder of the younger brother's estate, which would be divided in like manner among the mother, daughter and emancipator of the elder. The mothers of each brother would thus get on the whole twenty dínárs, the daughters sixty, and the emancipators no more than ten.—Sharífiyyah, page 151. *Vide* B. M. L., page 172. LECTURE IV.

LXXXVIII. But if it is known in what order they died, then those who died next or last will inherit from those who died before them. *Principle.*

LXXXIX. The rule concerning a captive is like the rule of other Musalmáns in regard to inheritance, as long as he has not departed from his (Muhammadan) faith. (Consequently he will inherit, and others will inherit from him; since a Musalmán wherever he be, is considered to be one of the residents in the country of peace or dár-ul-islám.*) But if he has departed from his faith, then the rule concerning him (is) the rule concerning an apostate (*v*).—Sirájiyyah, page 58. *Principle.* Of captives.

(*v*.) Because, there is no difference between him who becomes an apostate in the country of peace and then goes Reason.

ANNOTATIONS.

lxxxviii. There is no succession amongst the persons drowned or burned (together, and the like), except when it is known that they died one after another, in which case, he who died afterwards will inherit.—Durr-ul-Mukhtár, page 871.

The property of each will accordingly go to his own heirs, and none of them can be heir to another, unless it is known in what order they died, when those who died last will inherit from those who died before them.—Fatáwá Alamgírí, vol. vi, page 635.—B. Dig., page 704.

lxxxix, xc. A captive is subject to the same rules as other Musalmáns in respect of inheritance unless he renounces his own religion, and if he renounces it, he is subject to the same rules as apostates. If it is not known whether he has renounced his own religion, or whether he is dead or alive, he is subject to the same rules as missing persons.—Fatáwá Alamgírí, vol. vi, page 635.—B. Dig., page 704.

* Sharífiyyah, page 149.

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to (live in) a hostile country (dár-ul-harb), and him, who becomes an apostate in a hostile country and lives therein, as in both cases he is a resident in a hostile country.—Sharífiyyah, page 149.

Principle.

XC. If, however, his apostacy be not known, nor his life, nor his death, then the rule concerning him (is) the rule concerning a lost person.* So neither his property shall be divided, nor his wife shall be taken in marriage until intelligence is received in respect of him.†

If his heirs lay a claim (to his property) upon the allegation of his becoming an apostate in a hostile country, the same shall not be listened to, except upon the evidence of two upright Musalmáns. But when they give evidence, the Kází should pass judgment that, separation take place between him and his wife, and his property be divided amongst his heirs; since upon the judgment being given by the Kází, he is regarded as *civiliter mortuus*. And if he do return after the passing of the Kází's judgment, and deny his having become an apostate, (yet) the Kází shall not change his order; consequently, he shall get back neither his wife nor his property, save and except that which has remained exactly as it was in the hands of his heir; just as in the case of a known apostate returning with penitence.—Sharífiyyah, pages 149 and 150.

ANNOTATIONS.

lxxxix & xc. A captive is, with respect to inheritance, on the same footing as all Muhammadans, so long as he abides in the faith. If he abandons the faith, his condition is like that of other apostates. And if it be unknown whether he has apostatized or not, or is alive or dead, the rules respecting him are the same as those applicable to missing persons.—B. M. L., page 171.

* Sirájiyyah, page 53. † Sharífiyyah, page 149.

LECTURE V.

ON COMPUTATION OF SHARES, (*viz.*,)

On the Divisors of Shares—Equality—Proportion—Agreement—Difference of two Numbers, and—Arrangement.

Preliminary remarks.

ORIGINALLY, there are six shares in the Muhammadan law, namely, a moiety, a fourth and an eighth; two-thirds, one-third, and one-sixth. These shares are divided into two series—the first three of the shares forming the first series, and the other three, the second. And there are certain numbers of shares into one of which an estate is originally divided. These numbers are called the divisors of shares or roots of cases.—Now in the cases of several of the above shares occurring together, the way of finding the divisor is the following: 1—When all or any of the second series of the shares occur with a half (which is of the first series), then the divisor is six; when the former occurs with a fourth, the divisor is twelve, and when with an eighth, it is twenty-four.* And, 2—the way of determining the divisor in any of the cases in which the shares of both the abovementioned two series do not occur together, but of one only, is—that the divisor be

* If there are shares to be extracted which belong to different series, the extractor (or divisor) must be sufficiently large to admit of being divided by all the shares without a fraction, and it is the smallest number which is so divisible. Thus where there is a half with one or more of the other series, the extractor is six, which is the least number divisible by a half, a sixth, a third, and two-thirds, without a fraction; and when there is a fourth with one or more of the other series, the smallest number divisible without a fraction by a fourth, a sixth, a third, and two-thirds, is twelve, which is accordingly the extractor of the case. In like manner, where an eighth is found in conjunction with a sixth, a third, or two-thirds, the extractor is twenty-four, which is the lowest number that can be divided by all these numbers without a fraction.—B. M. L., page 88.

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proportionate to the lowest or smallest share in the case.* For instance, where there are two claimants, the share of one of whom is a moiety, and of the other an eighth, there, (to give the share of the claimant of one-eighth), the division must be made by eight; and where there are claimants of one-sixth and one-third, there, the property is made into six. All these will be illustrated with examples in the body of the Lecture.

The Arabian lawyers not having had the fractions which we have,—such as, anna, pie, gunda, kourí, kránti, danti† and so forth,—have had recourse to multiplication or multiplications by which each claimant might get his or her share in integral numbers. For instance, in the case of there being a father, mother, and three daughters, one-sixth part of the deceased's estate devolves on the father, one-sixth on the mother, and two-thirds go to the daughters: the estate, therefore, must be divided into six shares, of which the father takes one, the mother also one, and there remain four or two-thirds which go to the three daughters; but the same do not quadrate with them. Now according to our method the whole estate would at first be converted into sixteen annas, and two-thirds thereof—amounting to ten annas, thirteen gundas, one kourí, and one kránti, the portion of the daughters as above,—would be subdivided into three parts to give to each of the three daughters her individual share; and each of these three parts—amounting to three annas, eleven gundas, one kránti and one danti—would be the proportion of the share of each daughter. But as the Arabs cannot have recourse to this method, or any other convenient method of fractioning, they multiply the divisor, that is, the root of the case, by the number of the claimants whose shares are fractional, and allot integral parts to each claimant in proportion to his or her right. So

* When there are two or more shares, but they all fall within the same series, as a sixth, a third, (and two-thirds), or a half, a fourth, and an eighth, the name of any of the shares might serve the purpose of an extractor (or divisor); yet there would be this inconvenience in assuming the greater share for the purpose, that the smaller must be expressed by a fraction. The rule, therefore, in all such cases, is, that the name of the lowest shall be for the extractor. Thus when the shares are a third, and a sixth, the extractor is six, and when they are a half, a fourth and an eighth, the extractor is eight; and the estate is divisible into six or eight portions accordingly.—B. M. L., page 87.

† There are sixteen annas to a rupee, twenty gundas to an anna, four kouris to one gunda, or three krántis or nine dantis to one kourí.

in the case cited, as four (constituting two-thirds of the estate) could not be divided among three daughters without a fraction, the divisor six, into which the estate was first divided, is multiplied by three, and the product being eighteen, three will go to the father, three to the mother, and the remaining twelve to the three daughters—four to each: thus each of the claimants will get his or her share in integral parts. Where, however, the product of the first multiplication would not give integral parts to all the claimants in proportion to their rights in the heritage, there the multiplication of that product or gradual products will be repeated until integral parts quadrate with the proportion of every claimant's right and share. For examples hereof *vide* Principles ciii—cx, and the illustrations relative thereto. But before going into the process of multiplying and dividing as above, it is necessary to know the description of the number of the shares and persons, as well as the relations between the shares and the persons entitled to them. Now the numbers are of four sorts: 1—Similar or equal (Mutamásil), 2—Concordant (Mutadákhil), 3—Composit (Mutwáfik), and 4—Prime (Mutabáyin). The numbers are said to be *equal*, when they exactly agree with each other, as three and three;—*Concordant*, where one number being multiplied exactly measures or exhausts the other, as six divided by three or two is exhausted by either of them;—*Composit*, where a third number measures or exhausts them both, as eight and twenty are measured by four, and so they agree in a fourth,—and *Prime*, where no number (except one) measures them both, as nine and ten.*

There are seven rules systematically laid down in the Sirájiyyah as well as in several other works on Inheritance, according to which different descriptions of cases are settled, and distributions are made. These are given in full in the body of the Lecture. In working out, however, accord-

* If you wish to know agreement or disagreement between two different numbers, go on diminishing the larger of them by the smaller until they agree in one point: if they agree in unit only, there is no agreement, but disagreement, between them; if they agree in two, there is between them agreement in half; if in three, then in a third, and so on as far as ten. This process is denominated "Kasúr-ul-muntakah;" and if (they agree) in eleven, then (the agreement is) in a fraction of eleven (that is, in eleventh,) and so on: this (latter) is called "Asim."—Durr-ul-Mukhtár, page 878.

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ing to those rules, it is to be borne in mind that should there be found a common measure or agreement between the claimants and the shares, the former is to be divided by the common measure, and the root of the case multiplied by the quotient. This will be found in many of the illustrations of those rules as well as in some of the rules themselves.

Principle. XCI. There are six shares which are of two sorts or series: First,—a moiety, a fourth, and an eighth; Second,—two-thirds, a third, and a sixth.

There are three rules of division, (viz.):—

Principle. XCII. When half (which is from the first sort,) is mixed with all of the second sort, (that is, two-thirds, one-third, and one-sixth), or with any of them, then the division (of the estate) must be by six.* 2—When a fourth is mixed with all the shares of the

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xci. Know that the six shares mentioned in the book of Almighty God are of two sorts: of the first are—a moiety, a fourth and an eighth; and of the second sort are—two thirds, a third, and a sixth.—Sirájiyyah, page 23.

Now, when any of these shares occur in cases singly, the divisor for each share is that (number) which gives it the name, (except half, which is from two), as fourth is denominated from four, an eighth from eight, and a third from three (also a sixth from six†): and when they occur by two or three, and are of the same sort, then each integral number is the proper divisor to produce its fraction, also to produce the double of that fraction, and also the double of that;—as six produces a sixth, and, likewise, the double of that (which is a third†), and also the double of that (which is two-thirds†); so eight produces an eighth, and, likewise, the double of that number, that is a fourth, also the double of that, which is half.—*Vide* Sirájiyyah, page 23.

* Where a husband inherits from his childless wife, (his share in this case being one-half), and there are other claimants entitled to a sixth, a third, and two-thirds, such as a father, a mother, and two sisters, the division must be by six.—Macn. Princ. M. L., Chap. I, Sect. iv, Princ. 64.

† Sharífiyyah, pages 52, 53.

second sort, or with any of them, the division must be by twelve.* 3—When an eighth is mixed with all the shares of the second sort, or with any of them, then it (the division) must be by twenty-four.†—Sirájiyyah, page 23.

The rules above given respect the occurrence of all or any of the shares of the second series (namely, two-thirds, one-third, and one-sixth) with any of the shares of the first series; and not the occurrence solely of all or any of the shares of one series. Consequently,—

General Principle.

XCIII. The general rule, where the shares of one series only occur together, is, that division must be made in the proportion of the smallest or lowest share which may occur in the case. Thus,—

Special Principle.

XCIV. Where there are two claimants, one entitled to a moiety, and the other to a fourth, the division must be made by four;—as in the case of there being an only daughter and a husband, the property is divided into four parts, and two-fourths or a moiety will be given to the daughter and one-fourth to the husband, and the remaining one-fourth will revert‡ to the daughter.

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xcii. When half (which is) from the first sort is mixed with all of the second sort, that is with three of the other (sort), or with any of them, then the division must be by six. When a fourth (which is from the first sort,) is mixed with all of the second sort, or any of them, then (the division) must be by twelve. And when an eighth (which is) from the first sort, is mixed with any of the second sort or with all of them, then (the division must be) by twenty-four.—Durr-ul-Mukhtár, pages 877 & 878.

* Where a husband inherits from his wife who leaves children, or a wife from her childless husband, (the shares of these persons respectively in these cases being one-fourth), and there are other claimants entitled to one-sixth, one-third and two-thirds, the division must be by twelve.—Macn. M. L. Chap. I, Sect. iv, Princ. 65.

† Where a wife inherits from her husband, leaving children, (her share in that case being one-eighth), and there are claimants entitled to one-sixth, one third, or two-thirds, the division must be by twenty-four.—*Ibid*, Princ. 66.

‡ See the Section on Return.

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Principle. XCV. Where there are two claimants, the share of one of whom is half, and of the other an eighth,—as in the case of a daughter, and a wife, the property will be divided into eight parts, of which the daughter will take four, and the wife one. The surplus (three shares) will revert to the daughter.*

Principle. XCVI. Where there are two claimants, the share of one of whom is one-sixth, and of the other one-third,—as in the case of a mother and father being the only claimants, the property is made into six parts, of which the mother takes two (being her one-third share), and the father one-sixth as his legal share; and the residue reverts* to him as the only residuary.

Principle. XCVII. Where there are two claimants, the share of one of whom is one-sixth, and of the other two-thirds,—as in the case of a father and two daughters being the only claimants, the property is divided into six shares, of which the father takes one as his legal share, and the two daughters take four: the residue reverts to the father.*

Principle. XCVIII. Where there are two claimants, the share of one of whom is one-third, and of the other two-thirds,—as in the case of a mother and two sisters, the property is made into three parts, of which the mother takes one, and the two sisters two.†

In one and the same case, there cannot be more than four (sorts of) shares, and more than five parties, and there

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* See the Section on Return.

† No case can occur of two claimants, the one entitled to a fourth, and the other to an eighth; nor of three claimants, the one entitled to a half, the other to a fourth, and the third to an eighth.—Macn. M. L., Chap. I, Sect. iv, Princ. 59.

No case can occur of three claimants, the one entitled to one-sixth, the other to one-third, and the other to two-thirds.—*Ibid*, Princ. 63.

cannot be *kasar* (fraction) with respect to more than four parties.—Durr-ul-Mukhtár, page 877. LECTURE V.

XCIX. The *tamásul* (or similarity) of two numbers is the equality of one to the other (*a*).*—*Vide* Sirájiyyah, page 25. *Principle.*

(*a.*) As three to three: such two numbers are called mutamásil (equal).—Sharífiyyah, page 59. *Example.*

C. The *tadákhul* (or concordance) between two different numbers is when the smaller of the two numbers exactly measures the larger or exhausts it (*b*). Or we call it *tadákhul* between two numbers, when the larger of the two numbers is divided exactly by the smaller (*c*). Or we define it thus when one (number) or more equal to the smaller being increased upon it or added to it, the same (*i. e.*, the smaller number) becomes equal to the larger (*d*). Or it is *tadákhul* when the smaller (number) is an aliquot part of the larger (*e*),—as three of nine (*f*).† *Vide Ibid.* *Principle.*

(*b.*) That is, when you measure the larger by the smaller number twice or more times, nothing remains (in hand) of the larger number, as six and three; for, when you twice measure six by three, the former is totally exhausted: in like manner, when you measure nine by three, the number nine is exhausted by those measures, consequently these (*i. e.*, such) two numbers are technically called mutadákhil (one contained in the other).—Sharífiyyah, page 59. *Explanation.*

(*c.*) That is divided in such a manner as to leave no fraction;—as the number six is divided by three, as well as by two without leaving a fraction.—*Ibid.* *Explanation.*

(*d.*) For instance, when an equal number is once added to three, it becomes six, when twice, it becomes nine.—*Ibid.* *Example.*

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* Numbers are said to be "mutamásil," or equal, where they exactly agree.—Macn. M. L., Chap. I, Sect. v, Princ. 70. See *ante*, p. 201.

† They are said to be mutadákhil or concordant, where one number being multiplied exactly measures the other.—*Ibid*, Princ. 71, See *ante*, p. 201.

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Explanation.

(*e.*) These different definitions (of tadákhul) are merely (different) wordings; for, if the smaller number measures (or exhausts) the larger, the former is technically called an aliquot part of it, if it does not, it is (so many) units thereof.—Sharífiyyah, page 60.

Reason.

(*f.*) Because, the number three is one-third part of nine, and, as such, it is an aliquot part of nine, and exhausts it by measuring thrice, and becomes equal thereto by the double addition of itself; so the number nine is divided by it without leaving a fraction as already shown. These are the illustrations of all the definitions or descriptions of tadákhul.—*Ibid.*

Principle.

CI. The *tawáfuk* (agreement) of two numbers is, when the smaller does not (exactly) measure the larger, but a third number measures (or exhausts) them both (*g*).* See *ante*, p. 201.

Example.

(*g.*) As eight and twenty, (the former of which does not measure the latter, but†) both of them are measured by four (which exhausts eight by measuring it twice, and twenty by measuring it five times;†) so they agree in a fourth; since the number measuring them is the denominator of a fraction common to both.—Sirájiyyah, page 26.

CII. The *tabáyun* or difference of two numbers is, when no third number measures the two (discordant) numbers (*h*).‡—Sirájiyyah, page 25.

(*h.*) As nine and ten, (for no number measures them both, except one, which, according to the author, is not a measuring number.†) —*Ibid*, page 26.

Now the way of knowing the agreement or disagreement between two different quantities is, that the greater is diminished by the smaller quantity on both sides, once or often until they agree in one point; and if they agree in unit only, there is no (numerical) agreement between them;

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* They are said to be mutáwafik, or composit, where a third number measures them both.—*Ibid*, Princ. 72.

† Sharífiyyah, p. 60.

‡ They are said to be mutabáyin, or prime, where no third number measures them both.—*Ibid*, Princ. 73. See *ante*, page 201.

but if they agree in any other number, then they are (said to be) mutwáfik (composit) in a fraction of which that number is the denominator (*i*).—If (they agree) in two, they are mutwáfik in half, (as in the instance of four and ten,*) if in three, (they are mutwáfik) in a third, (as in the instance of nine and twelve,*) if in four, (they are mutwáfik) in a quarter (as in the instance of eight and twelve,*) and so on as far as ten. Above ten, (they agree) in a fraction, I mean, if the common measure be eleven, they agree in a fraction of eleven (*j*);† if in fifteen, (the yagree) in a fraction of fifteen (*k*).—Sirájiyyah, page 26.

(*i.*) If you diminish a large number by the repetition of a small number, and if the large is exhausted by it, then they are mutadákhil (concordant); but if there remain one, then they are mutabáyin (prime), as no number except one measures them both.—Sharífiyyah, page 61.

(*j.*) As twenty-two and thirty-three; for the number which measures or exhausts them is eleven only, the denominator, therefore, is a fraction of eleven, (that is, eleventh).—*Ibid*, page 62.

(*k.*) As thirty and forty-five, both of which being measured by fifteen, are mutwáfik (composit) in a fraction thereof.—Sharífiyyah, page 62.

"The reason," says Sharíf, "for limiting the relations of four sorts between numbers is, that when you compare one number with another, if they be the same in quantity, they are equal (mutamásil); if they do not, then, if the smaller measure or exhaust the greater, they are mutadákhil (concordant); if it (the smaller number) do not measure or exhaust (the other,) but a third number (excepting one) measure them, they are mutwáfik (composit); but if a third number also do not measure them, then they are mutabáyin (prime or discordant).—Sharífiyyah, pages 62, 63.

There are seven principles or rules of arrangement of cases respecting the division of shares. Of these rules,

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* Sharífiyyah, page 62.

† By 'a fraction' is here meant the ordinal number of eleven, *viz.*, 'the eleventh;' they call it a fraction, because in the Arabic language there is no ordinal adjective of numbers exceeding ten, which deficiency, therefore, is supplied by the term 'a fraction' of that number.

LECTURE V. three concern persons and shares, and four persons and persons.*—*Vide* Sirájiyyah, page 27.

Of the three rules which concern shares and persons,—

Principle. CIII. The first is—when the portions of all the classes (of heirs) are divided among them without a fraction, there is no need of multiplication.†—Sirájiyyah, page 28.

Example. As (if a man leave) both parents and two daughters (*l*).—*Ibid.*

Explanation. * (*l.*) For the division in this case is by six, and a sixth part thereof, that is one (share), is for each of the parents; and two-thirds, that is four (shares, are) for the two daughters, two for each: thus, the portions of (all) the heirs are allotted without a fraction.—Sharífiyyah, page 63.

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ciii. Recourse is had to these in order that the shares may be (allotted and) received in the smallest possible number (or quantity) in a manner that there be no fraction upon (*i.e.*, in the share of) any one of the heirs. If their portions agree with the number of their persons, then you must multiply the measure of (the number) of those persons by the root of the case, or by its increase, if it be an increased case. As in the case of one widow and six brothers (being left by a man) the brothers are entitled to three (out of four) shares, which (three) agree with their number by a third; consequently you must multiply two by four, and the case would be arranged by eight.—Durr-ul-Mukhtár, page 877.

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* There are seven rules of distribution, the first three of which depend upon a comparison between the number of the heirs and the number of the shares; and the four remaining ones upon a comparison of the numbers of the different sets of heirs, after a comparison of the number of each set of heirs with their shares.—Macn. M. L., Chap. I, Sect. v, Princ. 74.

† The first is when, on a comparison of the number of the heirs and the number of the shares, it appears that they exactly agree, there is no occasion for any arithmetical process. Thus where the heirs are a father, a mother, and two daughters, the share of the parents is one-sixth each, and that of the daughters, two-thirds. Here the division must be by six; of which each parent takes one, and the remaining four go to the two daughters.—*Ibid*, Princ. 75.

CIV. The second is, that if the portions of one class be fractional, yet there be an agreement between the portions and persons, then the measure of the number of those persons, whose shares are broken, must be multiplied by the root of the case, or by the increase thereof, if it be an increased one.*—Sirájiyyah, page 27. LECTURE V. *Principle.*

As (when a man leaves) both parents and ten daughters (*m*);—or (when a woman leaves) a husband, both parents, and six daughters (*n*).—*Ibid.* Example.

(*m.*) The first is the example of a case without increase, for (the number of) the root of the case is six, of which two-sixths, that is two, are for the parents, which are divided between them without a fraction, two-thirds, which are four, are for the ten daughters, but the same cannot be divided among them without fractions, there is, however, agreement in half between four and ten, for, the number which measures them both is two; consequently, the number of the persons that is ten, is reduced to half, that is five, and is multiplied by six, which is the root of the case, and the product is thirty, by which the case is arranged; inasmuch as, the two parents had two shares out of the root of the case, the same being multiplied by five, the multiplicand, amounted to ten, five of which is for each of them. The daughters had four (shares) out of the root of the case, which being multiplied by five amounted to twenty, so two go to each of them.

(*n.*) The second is the example of an increased case, for, here (the number of) the root of the case is twelve, by

* The second (rule) is when, on a comparison of the number of the heirs and the number of sharers, it appears that the heirs cannot get their portions without a fraction, and that some third number measures them both, when they are mutwáfik or composit; as in the case of a father, a mother, and ten daughters. Here the division must be by six. But when each parent has taken a sixth, there remain only four to be distributed among the ten daughters, which cannot be done without a fraction, and on a comparison of the number of heirs who cannot get their portions without a fraction, and the number of shares remaining for them, they appear to be composit, or agree in two. In this case, the rule is, that half the number of such heirs, which is 5, must be multiplied into the number of the original division 6: thus $5 \times 6 = 30$; of which the parents take ten or five each, and the daughters twenty or two each.—Macn. M. L., Chap. I, Sect. v, Princ. 76.

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reason of a fourth, sixth, and two-thirds occurring together as is already mentioned; consequently, one-fourth thereof, which is equal to three, is for the husband, and two sixths, that is four, go to the parents, and two-thirds, which are eight, are for the six daughters: thus the root of the case is increased to fifteen; but the daughters' shares, which are eight, cannot be divided among them without fraction; the numbers of their persons and shares, however, agree in half; consequently, the number of their persons is reduced to half which is equal to three, then the same is multiplied by the root of the case and its increase, which (altogether) is fifteen, and the number obtained by the multiplication is forty-five, by which the case is arranged; inasmuch as, out of the (number of the) root of the case, the husband had three, which is multiplied by the multiplied number=3, and the product is nine: the parents had four, which being multiplied by three amounted to twelve, so six is for each of them; and the daughters had eight (shares), which being multiplied by three became twenty-four, so four is for each of them.—Sharífiyyah, page 63.

Principle.

CV. The third (rule) is that (if the portions of one class only be fractional, and*) there be no agreement (but disagreement*) between those portions and persons, then the whole number of the persons, whose shares are broken, must be multiplied into

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CV. If the portions of any class be fractional, then the number (of the persons) thereof must be multiplied into the root of the case (if it be not an increased one) and into (the root and) its increase, if it be an increased case.—Durr-ul-Mukhtár, page 877.

As (in the case of) a widow and two brothers (being left by a man him surviving), one-fourth goes to the widow, and the remaining three-fourths remain for the two (brothers), which cannot be divided between them without a fraction, and there is no agreement (between the number of persons and that of portions), consequently, two (the number of the brothers whose shares are broken) must be multiplied into four, and thus the case would be arranged in eight.—Durr-ul-Mukhtár, page 877.

* Sharífiyyah, page 66.

the root of the case* (if it be not an increased case, but if it be an increased one, then into the root, and also into the increase.†)—Sirájiyyah, page 29.

Example.

As (when a woman left) her husband and five sisters by the same father and mother (*o*).—*Ibid.*

(*o*.) Here the original division is by six; half of which, amounting to three, goes to the husband, and two-thirds, amounting to four, go to the sisters; the number of the case is therefore increased to seven, and as the portions of the sisters alone are fractional, and there is no agreement between the number of their shares and persons, that is (between) four and five; we multiply the whole number of their persons, which is five, into the root of the case and its increase which (together) amount to seven, and the product amounts to thirty-five, by which the case is arranged: originally, the husband had three, which multiplied into five, (the multiplicand,) amounts to fifteen; the five sisters had four, which also being multiplied into five amounts to twenty; thus four go to each of them.

Further Example.

The example of an unincreased case is, that a husband, a grandmother, and three sisters by the same mother only (being left by a man), the division is by six, half of which (=3) is for the husband, one-sixth (=1) is for the grandmother, and one-third (=2) is for the sisters, but this cannot be divided among them without a fraction, and there is no agreement, but disagreement, between their persons and shares; consequently, we multiply the whole number of the persons of the sisters into the root of the case, and

* The third is when, on a comparison of the number of the heirs and the number of the shares, it appears that the heirs cannot get their portions without a fraction, and that there is one over and above between the number of such heirs, and the number of shares remaining for them. This is termed mootabayun, or prime, as in the case of a father, a mother, and five daughters. Here also the division must be by six. But when each parent has taken a sixth, there remain only four to be distributed among the five daughters, which cannot be done without a fraction, and on a comparison of the number of heirs who cannot get their portions without a fraction, and the number of shares remaining for them, they appear to be mootabayun, or prime. In this case the rule is, that the whole number of such heirs, which is five, must be multiplied into the number of the original division. Thus 5×6=30, of which the parents take ten, or five each, and the daughters twenty, or four each.—Macn. M. L., Chap. I, Sect. v, Princ. 77.

† Sharífiyyah, page 66.

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the product amounts to eighteen, by which the case is arranged. Originally, the husband had three, which multiplied into three (the multiplicand) amounts to nine, then we multiply the portion of the grandmother into the said multiplicand (=3), and the product amounts to three, and (lastly) we multiply the portions of the sisters by the same mother only into the multiplicand, and the product amounts to six, and we give two to each of these (sisters.)—Sharífiyyah, page 64.

Of the four other rules which concern persons and persons :—

Principle. CVI. The first (or the fourth of the seven rules) is, that when there is a fractional division between two or more classes of heirs, but an equality between the numbers of persons (whose shares are fractional,*) then the rule is, that one of the (equal) numbers be multiplied into the root of the case.†—Sirájiyyah, page 29.

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cvi. If the division between two or more classes (of heirs) be fractional, but there is an equality between the numbers of the persons, then one of the numbers must be multiplied into the (simple) root of the case, or into the same increased, (if the case be an increased one).—Durr-ul-Mukhtár, page 877.

As (in the case of there being) three daughters, and three paternal uncles. Here you must be contented with one of the equal numbers, and multiply three into the root of the case, and it (the product) would amount to nine, by which the case is arranged.—*Ibid.*

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* Sharífiyyah, page 65.

† The fourth is when, on a comparison of the different sets of heirs, it appears that one or more sets cannot get their portions without a fraction, and that all the sets are mutamasil, or equal, as in the case of six daughters, three grandmothers, and three paternal uncles; in which case according to Principle 61, the division must be by six. Here, in the first instance, a comparison must be made between the several sets and their respective shares. The share of the daughters is two-thirds, but two-thirds of six is 4, and 4 compared with the number of daughters 6, is mootwafik, or composit, agreeing in two. The share of the three grandmothers is one-sixth, but one-sixth of six is 1, and 1 compared with the number of grandmothers is mootabayun, or prime. The remaining share, which is one, will devolve on the three

As (if there be) six daughters, three grandmothers, and three paternal uncles (*p*).—*Ibid.* LECTURE V.

(*p.*) The original division (in the above case) is by six, (of which) two-thirds=4 are for the six daughters, which cannot be divided among them without a fraction, there is, however, agreement in half between four and the number of their persons; consequently we take half=3 of the number of the persons. For the three grandmothers is one-sixth=1, which also cannot be divided among them without a fraction, and there is no agreement between one and the number of their persons; consequently, we take the whole of their number which also is three; then the remainder, which is one, is for the uncles, but there is disagreement between this and the number of their persons; consequently, we take the whole of the number of their persons; then comparing these numbers (thus) taken, and finding them equal (to each other), we multiply one of them, which is three into the root of the case, that is six, and get eighteen by which the case is arranged. For, (originally,) the daughters had four, which multiplied into three, the multiplicand, amounts to twelve, thus, two is for each of them; the grandmothers had one, which also is multiplied by three, and the product, amounting to three, one is for each of them; the uncles, too, had one, which also is multiplied into three, and one (thereof) is allotted to each of them. If, however, in the above case or example, it be supposed that there is one uncle instead of three, then there would be a fractional division between two classes only, but there would be an equality between the number of the persons of the daughters and the number of the grand- Example. Explanation.

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paternal uncles, but one compared with three is also mootabayun, or prime. Macn. M. L., Chap. I, Sect. v, Princ. 78.

Then the rule is, that the sets of heirs themselves must be compared with each other by the whole where it appears that they were mutadakhil, or concordant, or mootabayun, or prime; and by the measure where it appears that they were mutwafik, or composit, and if agreeing in two, by half. In the instance of the daughters, the result of the former comparison was that they agreed in two; consequently the half of their number must be compared with the whole number of the grandmothers and of the uncles, in whose case the comparison showed a prime result. Thus 3=3 and 3=3, which being mootamasil, are equal, the rule is, that one of the numbers be multiplied into the number of the original division. Thus 3×6=18, of which the daughters will take (two-thirds) twelve, or two each; the grandmothers will take (a sixth) three, or one each; and the paternal uncles will take the remaining three, or one each.—Macn. M. L., Chap. I, Sect. v, Princ. 78.

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mothers, each of which amounting to three; consequently, three must be multiplied into the root of the case, and the product would amount to eighteen, by which the shares of all parties would be regulated as already mentioned.—Sharífiyyah, page. 65.

Principle.

CVII. The second* is, when some of the numbers (of the persons who are heirs†) are comprized in, or equally measure, the others, then the rule is, that the greater number be multiplied into the root of the case.‡—Sirájiyyah, page 29.

ANNOTATIONS.

cvii. If the division between three or four classes (of heirs) be fractional, then, you must see if, in the first place, there is a measuring (*q*) between the shares and the number (of the persons), then between the numbers of the persons (of the different sharers), and then you must proceed as you have done between two classes, in (the instance of) tadákhul, tamásul, twafik, and tabáyun, and by so doing whatever may be had you must multiply the same into the root of the case.—Durr-ul-Mukhtár, page 877.

(*q*.) By this expression, used by the author, it is meant that, if some of the numbers measure the others; as (where a man leaves) four wives and three grandmothers and twelve paternal uncles, there you must, by reason of their being tadákhul, multiply the larger number, which is twelve, into the root of the case, and the product would amount to one hundred and forty-four, by which the case would be arranged.—Durr-ul-Mukhtár, page 877.

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* That is, the fifth of the seven rules. See *ante*, pp. 207 & 208.

† Sharífiyyah, page 66.

‡ The fifth is when, on a comparison of the different sets of heirs, it appears that one or more sets cannot get their portion without a fraction, and that the sets are mootadákhil, or concordant; as in the case of 4 wives, 3 grandmothers, and 12 paternal uncles. In this case, the division must be by twelve. Here in the first instance, a comparison must be made between the several sets and their respective shares. Thus the share of the four wives is one-fourth; but the fourth of twelve is 3, and 3 compared with the number of wives is mootabáyun, or prime. The share of three grandmothers is one-sixth; but the sixth of twelve is 2, and 2 compared with the number of grandmothers is also prime. The remaining shares, which are seven, will devolve on the twelve paternal uncles, but 7 compared with 12 is also prime. Then the rule is, that the sets of heirs themselves must be compared, the whole of each with the whole of each, as the preceding results show that they are prime on a comparison of the several heirs with their respective shares. Thus $4\times3=12$, and $3\times4=12$, which being concord-

As (if a man leave) four wives, and three grandmothers, and twelve paternal uncles (*r*).

Example.

Explanation.

(*r*.) The root of the case (in the above example) is twelve, (out of which) a sixth part=2 is for the grandmothers, which cannot be divided among them without a fraction, but there being disagreement between (the number of) their persons and (that of) their shares, we take the whole number of their persons which is three; for the four wives is one-fourth=3, which not being divided among them without a fraction, and there being no agreement between (the number of) their persons and shares, we take the (whole) number of their persons which is four; and the remainder, wihch is seven, is for the uncles, but this cannot be divided among twelve persons without a fraction and there is disagreement between the two; consequently, we take the whole number of their persons; then we look for the relation (if any) among the number of their persons (thus) taken, and we find that three and four are mutadákhil (comprised) in twelve, which is the largest number of the persons; consequently, we multiply this (twelve) into the root of the case which is also twelve, and the product is one hundred and forty-four, by which the case is arranged; inasmuch as, out of the root of the case, the grandmothers had two, which being multiplied into the multiplicand (=12) amounts to twenty-four; so eight go to each of them: the wives had three from the root of the case, which being multiplied into the multiplicand aforesaid amounts to thirty-three; consequently nine go to each of them; and the uncles had seven, which also we multiply into twelve and the product is eighty-four, so each of them is to have seven. If, however, it be supposed, in the above case, that there is but one wife, instead of four wives, then the division of two classes only would be fractional, that is of the three grandmothers, and twelve uncles; and the number of the persons of the grandmothers is *mutadákhil* (comprised) in the number of the persons of the uncles; consequently, the largest of the two mutadákhil numbers, that is

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ant, the one number measuring the other exactly, the rule is, that the greater must be multiplied into the number of the original division. Thus 12×12=144; of which the wives will get (one-fourth) thirty-six, or nine each, the grandmothers (a sixth) twenty-four, or eight each, and the paternal uncles the remaining eighty-four, or seven each.—Macn. M. L., Chap. I, Sect. v, Princ. 79.

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twelve, must be multiplied into the root of the case, then we shall gain that (number) which would be divided without a fraction among all (the parties), according to the theorem as you have known.—Sharífiyyah, page 66.

CVIII. The third* is, when some of the numbers (of the persons of two or more classes whose portions are fractional) are *mutwáfik*, or composit, with others, then the rule is, that the measure of one of the numbers be multiplied in the whole of the second, then the product into the measure of the third, if it be mutwáfik, if not, then into the whole of the third, and then (this product) into the fourth, and so on, in the same manner, after which the (last) product must be multiplied into the root of the case.†—Sirájiyyah, Arabic, page 67; English, page 39.

ANNOTATIONS.

cviii. If the number of some (of the persons) be mutwáfik with (that of) others; as (in the instance of) four wives, fifteen grandmothers, eighteen daughters, and six paternal uncles (being left by the deceased), the measure of one of the two (that is the measure of the number of one class) is multiplied into the whole of the other, and the product into the measure of the third, provided it be mutwáfik, otherwise into the whole; next, the fourth (must be multiplied) in the same manner, then the aggregate, which, according to our case, is one hundred and eighty, into the root of the case, which is here twenty-four: thus the product would be four thousand three hundred and twenty, by which the case is arranged.—Durr-ul-Mukhtár, page 877.

* That is, the sixth of the seven principles or rules. See *ante*, pages 107 and 108.

† The sixth is when, on a comparison of the different sets of heirs, it appears that one or more sets cannot get their portions without a fraction, and that some of the sets are mutwáfik, or composit, with each other; as in the case of four wives, eighteen daughters, fifteen female ancestors, and six paternal uncles; in which case, the original division must be by 24. Here, in the first place, a comparison must be made between the several sets and their respective shares. Thus the share of the four wives is an eighth, but the eighth of 24 is 3, and three compared with the number of wives is mootabayun, or prime. The share of the eighteen daughters is two-thirds; but two-thirds of 24 is 16, and 16 compared with the number of daughters 18, is composit, and they agree in 2. The share of the fifteen female ancestors is

As (if a man leave) four wives, eighteen daughters, fifteen female ancestors, and six paternal uncles (*s*).—*Ibid.*

Example. Explanation.

(*s*.) The root of the case is twenty-four, out of which the wives had an eighth part = 3, which cannot be divided among them without a fraction, and there is disagreement between the number of their shares and persons,—consequently we reserve the whole of the number of their persons; the eighteen daughters had two-thirds amounting to sixteen, which cannot be divided among them without a fraction, but between the number of their persons and that of their shares there is agreement in half, so we take half the number of their persons, which is nine, and reserve the same; the fifteen female ancestors had a sixth part=4, which cannot be divided amongst them without a fraction, and the number of their persons and that of their shares do not agree, so we reserve the whole number of their persons; the six uncles had the remainder=1, which also cannot be divided among them without a fraction, and there is disagreement between this (number) and the number of their persons,—consequently we reserve the whole of the number of their persons: thus having in hand the reserved numbers of the persons, *viz.*, four, six, nine, and fifteen, we look for agreement between four and six, and find that four and six agree in half; then we reduce one of them into half and

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one-sixth; but a sixth of 24 is 4, and 4 compared with the number of female ancestors 15, is prime. The remaining share, which is one, will devolve on the six paternal uncles as residuaries; but one and six are prime.—Macn. M. L., Chap. I, Sect. v, Princ. 80.

Then the rule is, that the sets of heirs themselves must be compared, by the whole, where the preceding result shows that they were prime; and by their measure, where it shows that they were composit. Thus $4\times2=9-1$, which being prime, the one number must be multiplied by the other. This result must then be compared with the whole of the third set, because the preceding result shows that set to have been prime. Thus $15\times2=36-6$, and $6=15-9$, and $6=9-3$, which agreeing in three, the third of one number, must be multiplied into the whole of the other. This result must also be compared with the whole of the fourth set, because the preceding result shows that set to have been prime. Thus $6\times30=180$, which being concordant, or agreeing in six, the sixth of one number must be multiplied into the whole of the other, but as it is obvious that by this process the result would still be the same, multiplication is needless. Then this result must be multiplied into the original division. Thus $180\times24=4,320$, of which the four wives will get an eighth, five hundred and forty, or one hundred and thirty-five each; the eighteen daughters two-thirds, two thousand eight hundred and eighty, or one hundred and sixty each; the female ancestors one-sixth, seven hundred and twenty, or forty-eight each; and the paternal uncles the remaining one hundred and eighty, or thirty each.—*Ibid.*

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twelve, must be multiplied into the root of the case, then we shall gain that (number) which would be divided without a fraction among all (the parties), according to the theorem as you have known.—Sharífiyyah, page 66.

CVIII. The third* is, when some of the numbers (of the persons of two or more classes whose portions are fractional) are *mutwáfik*, or composit, with others, then the rule is, that the measure of one of the numbers be multiplied in the whole of the second, then the product into the measure of the third, if it be mutwáfik, if not, then into the whole of the third, and then (this product) into the fourth, and so on, in the same manner, after which the (last) product must be multiplied into the root of the case.†—Sirájiyyah, Arabic, page 67; English, page 39.

ANNOTATIONS.

cviii. If the number of some (of the persons) be mutwáfik with (that of) others; as (in the instance of) four wives, fifteen grandmothers, eighteen daughters, and six paternal uncles (being left by the deceased), the measure of one of the two (that is the measure of the number of one class) is multiplied into the whole of the other, and the product into the measure of the third, provided it be mutwáfik, otherwise into the whole; next, the fourth (must be multiplied) in the same manner, then the aggregate, which, according to our case, is one hundred and eighty, into the root of the case, which is here twenty-four: thus the product would be four thousand three hundred and twenty, by which the case is arranged.—Durr-ul-Mukhtár, page 877.

* That is, the sixth of the seven principles or rules. See *ante*, pages 107 and 108.

† The sixth is when, on a comparison of the different sets of heirs, it appears that one or more sets cannot get their portions without a fraction, and that some of the sets are mutwáfik, or composit, with each other; as in the case of four wives, eighteen daughters, fifteen female ancestors, and six paternal uncles; in which case, the original division must be by 24. Here, in the first place, a comparison must be made between the several sets and their respective shares. Thus the share of the four wives is an eighth, but the eighth of 24 is 3, and three compared with the number of wives is mootabayun, or prime. The share of the eighteen daughters is two-thirds; but two-thirds of 24 is 16, and 16 compared with the number of daughters 18, is composit, and they agree in 2. The share of the fifteen female ancestors is

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As (if a man leave) four wives, eighteen daughters, fifteen female ancestors, and six paternal uncles (*s*).—*Ibid.*

Example.

(*s*.) The root of the case is twenty-four, out of which the wives had an eighth part = 3, which cannot be divided among them without a fraction, and there is disagreement between the number of their shares and persons,—consequently we reserve the whole of the number of their persons; the eighteen daughters had two-thirds amounting to sixteen, which cannot be divided among them without a fraction, but between the number of their persons and that of their shares there is agreement in half, so we take half the number of their persons, which is nine, and reserve the same; the fifteen female ancestors had a sixth part=4, which cannot be divided amongst them without a fraction, and the number of their persons and that of their shares do not agree, so we reserve the whole number of their persons; the six uncles had the remainder=1, which also cannot be divided among them without a fraction, and there is disagreement between this (number) and the number of their persons,—consequently we reserve the whole of the number of their persons: thus having in hand the reserved numbers of the persons, *viz.*, four, six, nine, and fifteen, we look for agreement between four and six, and find that four and six agree in half; then we reduce one of them into half and

Explanation.

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one-sixth; but a sixth of 24 is 4, and 4 compared with the number of female ancestors 15, is prime. The remaining share, which is one, will devolve on the six paternal uncles as residuaries; but one and six are prime.—Macn. M. L., Chap. I, Sect. v, Princ. 80.

Then the rule is, that the sets of heirs themselves must be compared, by the whole, where the preceding result shows that they were prime; and by their measure, where it shows that they were composit. Thus $4\times2=9-1$, which being prime, the one number must be multiplied by the other. This result must then be compared with the whole of the third set, because the preceding result shows that set to have been prime. Thus $15\times2=36-6$, and $6=15-9$, and $6=9-3$, which agreeing in three, the third of one number, must be multiplied into the whole of the other. This result must also be compared with the whole of the fourth set, because the preceding result shows that set to have been prime. Thus $6\times30=180$, which being concordant, or agreeing in six, the sixth of one number must be multiplied into the whole of the other, but as it is obvious that by this process the result would still be the same, multiplication is needless. Then this result must be multiplied into the original division. Thus $180\times24=4,320$, of which the four wives will get an eighth, five hundred and forty, or one hundred and thirty-five each; the eighteen daughters two-thirds, two thousand eight hundred and eighty, or one hundred and sixty each; the female ancestors one-sixth, seven hundred and twenty, or forty-eight each; and the paternal uncles the remaining one hundred and eighty, or thirty each.—*Ibid.*

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multiply the same (half) into the other, and the product is twelve, which agree with nine in three; then we multiply one-third of one of the two (numbers) into the whole of the other (number), and the product we get amounts to thirty-six: we find also agreement in three between this product and the number fifteen; consequently we multiply one-third of fifteen, = 5, into thirty-six, and the product gained amounts to one hundred and eighty: next we multiply this third product into the root of the case, that is twenty-four, and the product is four thousand three hundred and twenty, by which the case is arranged. For out of the root of the case, the wives had three (shares), which multiplied into the multiplicand=180 amounts to five hundred and forty, so to each of the four wives are allotted one hundred and thirty-five; the eighteen daughters had sixteen (shares), which multiplied into the multiplicand amounts to two thousand eight hundred and eighty,—consequently, to each of them go one hundred and sixty: the fifteen grandmothers (female ancestors) had four, which multiplied into the multiplicand aforesaid amounts to seven hundred and twenty,—consequently, for each of them is forty-eight; and the six paternal uncles had one, which multiplied into the multiplicand amounts to one hundred and eighty,—consequently to each of them are allotted forty. Now if you add together the shares of all the heirs, the aggregate will amount to four thousand three hundred and twenty.—Sharífiyyah, page 67.

Principle. CIX. The fourth* is, when the numbers (of two or more classes of persons whose shares became

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* That is, the seventh of the seven principles or rules of arrangement. See *ante*, pages 107 & 108.

The seventh and the last is, when, on a comparison of the different sets of heirs, it appears that all the sets are mutabayin, or prime, and none of them agrees with the other; as in the case of two wives, six female ancestors, ten daughters, and seven paternal uncles. Here the original division must be by 24.—Macn. M. L., Chap. I, Sect. v, Princ. 81.

In the first instance, a comparison must be made between the several sets of heirs and their respective shares. Thus the share of the two wives is one-eighth; but the eighth of 24 is 3, and 3 compared with the number of wives is prime. The share of the six female ancestors is one-sixth; but the sixth of 24 is 4, and 4 compared with the number of female ancestors is composit, or agrees in two. The share of the ten daughters is two-thirds; and two-thirds of 24 is 16, and 16 compared with the number of daughters is also composit, or agrees in two. The remaining share, which is one, will devolve

fractional) are mutabáyin, or discordant with one another, then the rule is that one (that is, the first) of the numbers be multiplied into the whole of the second, and the product (be multiplied) into the whole of the third, and this product into the whole of the fourth; then the (last) product into the root of the case.—Sirájiyyah, page 39. LECTURE V.

As (if a man leave) two wives, six female ancestors, ten daughters, and seven paternal uncles (*t*).—*Ibid.* Example.

(*t*.) The root of the case is twenty-four, so (out of that) each of the two wives is entitled to an eighth part=3, but this cannot be divided between them two without a fraction, Explanation.

ANNOTATIONS.

cix. If the numbers of the persons, whose portions became fractional, do not agree,—as in the case of two wives, ten daughters, six grandmothers (or female ancestors), and seven paternal uncles,—one of the two, that is one of the numbers, must be multiplied into the whole of the other, and the product into the whole of the third, and this product into the whole of the fourth: here the product will amount to two hundred and ten by reason of the numbers of the daughters and the female ancestors agreeing in half, with their respective shares, so this number must be multiplied into the root of the case, which is twenty-four, and the product, amounting to five thousand and forty, will be divided without a fraction.—Durr-ul-Mukhtár, page 877.

on the seven paternal uncles; but 1 and 7 are prime.—Macn. M. L., Chap. I, Sect. v, Princ. 81.

Then the rule is, that the sets of heirs themselves must be compared, by the whole, where the preceding result shows that they were prime; and by the half or other measure, where it shows that they were composit. Agreeably to this rule the whole of the first set of heirs must be compared with half of the second: thus 2=3−1, which numbers being prime must be multiplied into each other. Then the result must be compared with the half of the next set, the former result here also having agreed in 2. Thus 5=6−1, which being prime, must be multiplied into each other. Then the result must be compared with the whole of the next set, the former result here having been prime. Thus 7×4=30−2 and 2×3=7−1, which being also prime, must be multiplied into each other. Thus 30×7=210, in which case the rule is, that this last product must be multiplied into the number of the original division. Thus 210×24=5,040, of which the wives will take an eighth=six hundred and thirty, or three hundred and fifteen each; the female ancestors a sixth=eight hundred and forty, or one hundred and forty each; the daughters two-thirds=three thousand three hundred and sixty, or three hundred and thirty-six each; and the paternal uncles the remaining two hundred and ten, or thirty each.—Macn. M. L., Chap. I, Sect. v, Princ. 81.

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and there is no agreement between (the numbers of) their persons and (that of) their shares, we therefore take (*i. e.*, reserve) the number of their persons, which is two: the female ancestors are entitled to one-sixth=4, which cannot be divided among them without a fraction, but there is agreement in half between the number of their persons and that of their shares, so we take half the number of their persons, which (half) is three: the ten daughters are entitled to two-thirds=16, which cannot be divided among them without a fraction, and there is agreement in half between the number of their persons and that of their shares,—consequently we take half of the number of their persons, which (half) is five; and the seven uncles are entitled to the residue=1, which cannot be divided among them without a fraction, and there is no agreement between this and the number of their shares, so we reserve the number of their persons, which is seven. Thus, the numbers of persons we have are—two, three, five, and seven, none of which (numbers) agrees with another. We therefore multiply two into three, and the product is six, which we multiply into five and get thirty: next we multiply thirty into seven, and the product (gained) is two hundred and ten; we then multiply this produot into the root of the case, which is twenty-four. Thus the total amounts to five thousand and forty, by which the case is arranged for all the parties. Out of the root of the case—the two wives had three, which we multiply into the multiplicand (=210) and obtain six hundred and thirty, so each of the two wives will get three hundred and fifteen; the six grandmothers had four, which we multiply into the said multiplicand, and obtain eight hundred and forty,—consequently, one hundred and forty go to each; the ten daughters had sixteen, which being multiplied into the multiplicand aforesaid produces three thousand three hundred and sixty, each of them, therefore, is to have three hundred and thirty-six; (and) the seven uncles had one, which multiplied into the said multiplicand amounts to two hundred and ten,—consequently thirty go to each of them.—Sharífiyyah, page 68.

Principle. CX. Now if you desire to know the share of each class by arrangement, multiply what each class has from the root of the case (by what you have already multiplied) into the root of the case, (that is

into the multiplicand* which you have multiplied into the root thereof,) and the product (of such multiplication*) is the share of that class.†—Sirájiyyah, page 39. LECTURE V.

CXI. Then, if you desire to know the share of each individual in that class by arrangement, divide what each class has from the principle of the case by the number of the persons therein, then multiply the quotient (of such division*) into the multiplicand (that is, the number you have multiplied into the root of the case for the sake of arrange- *Principle.*

ANNOTATIONS.

cx. When you desire to know the share of each class—such as daughters, grandmothers, paternal uncles, and the rest by the arrangement whereby the shares were allotted to all the persons without a fraction—then multiply what each class has from the root of the case (by the multiplicand which was multiplied) into the root of the case, and its share (that is the share of such class) will be thereby found.—Durr-ul-Mukhtár, page 878.

cxi. Then if you desire to know the share of each individual of that class, multiply the share of each heir into the multiplicand, and his share will be found.—Durr-ul-Mukhtár, page 878.

* Sharíflyyah, page 70.

† When the whole number of shares, into which an estate should be made, has been found, the mode of ascertaining the number of portions, to which each set of heirs is entitled, is to multiply the portions, originally assigned to them, by the same number by which the aggregate of the original portions was multiplied; as an easy example of which rule the following case may be mentioned:—There are a widow, eight daughters, and four paternal uncles; the shares of the two first sets being one-eighth and two-thirds, the estate, according to Principle 66, must be made originally into twenty-four parts, of which the widow is entitled to 3, the daughters to16, and there remain 5 to be divided among the four paternal uncles, but which cannot be done without a fraction. Here the proportion between the shares and the heirs who cannot get their portions without a fraction must be ascertained, and 4=5—1, being prime, the rule is to multiply the number of the original division by the whole number of the heirs so situated. Thus $24 \times 4 = 96$. Here, to find the shares of each set, multiply what each was originally declared entitled to by the number, by which the aggregate of all the original portions was multiplied. Thus $3 \times 4 = 12$, the share of the widow; $16 \times 4 = 64$, the share of the daughters; and $5 \times 4 = 20$, the share of the paternal uncles.—Macn. M. L., Chap. I, Sect. v, Princ. 82.

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ment,*) and the product (obtained by multiplying the quotient into the said multiplicand*) will be the share of each individual in that class (*u*).†—Sirájiyyah 39.

Illustration.

(*u*.) For instance, in the above-mentioned example, by reason of disagreement in the numbers of the persons of the heirs, the two wives had three out of the root of the case, but when you divide the same between them, the portions will amount to one and half (each), then if you multiply it into the multiplicand, which is two hundred and ten, three hundred and fifteen will be found to be the portion of each of the two wives. The daughters had sixteen out of the root of the case; but when you divide the same by the number of their persons, which is ten, it will be found that the portion of each (of them) is one and three-fifths of one; so if you multiply this quotient into that multiplicand, the product will be three hundred and thirty-six, which is the portion of each of the daughters. The female ancestors had four out of the root of the case; but when this is divided among the six, which is the number of their persons, the quotient is two-thirds of one; so if you multiply this into the multiplicand aforesaid, the product will be one hundred and forty, which is the portion of each of the female ancestors. The paternal uncles had one out of the root of the case, but when you divide this (one) by seven, which is the number of their persons, the quotient is one-seventh; then if you multiply this into the multiplicand, which is two hundred and ten, the product is thirty, which is the portion of each of the paternal uncles.—Sharífiyyah, page 70.

Principle.

CXII. Another method (to know the share of each individual of a class*) is to divide the multiplied number (that is, the number which was

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* Sharífiyyah, pages 70, 71.

† To find the portion of each individual in the several sets of heirs, ascertain how many times the number of persons in each set may be multiplied into the number of shares ultimately assigned to each set. Thus $8 \times 8 = 64$, and $5 \times 4 = 20$. Here eight will be the share of each daughter, and four the share of each paternal uncle, which, with the twelve which formed the share of the widow, will make up the required number ninety-six.—Macn. M. L., Chap. I, Sect. v, Princ. 83.

multiplied into the root of the case for arrangement,*) by whichever class (of the heirs*) you think proper, then to multiply the quotient into the share of that class (by which you have divided the multiplied number,*) and the product (obtained by this multiplication*) will be the share of each individual in that class (*v*).—Sirájiyyah, page 30. LECTURE V.

(*v*.) Thus in the above-mentioned example or case, which is prime, when you have divided the multiplicand, which is two hundred and ten, by two (the number of the wives), the quotient will amount to one hundred and five; then if you multiply this quotient by three (the number of) their shares in the root of the case, the product will amount to three hundred and fifteen, which is for each (of the wives): in like manner, if you divide the multiplicand (=210) by the (number of the) daughters (=10), the quotient will be twenty-one, and then if you multiply this quotient by their shares (which are sixteen), into the root of the case, the product will amount to three hundred and thirty-six, which is for each of the daughters; and if you divide it (the said multiplicand) also by six, the number of the female ancestors, the quotient will be thirty-five, which multiplied by four, the number of their shares, into the root of the case, will produce one hundred and forty, which is the portion of each of the female ancestors; and if you divide also the said multiplicand by seven, the number of the paternal uncles, the quotient will amount to thirty, and then if you multiply this quotient into one, the number of their share in the root of the case, the product will amount to thirty, which is the portion of each of the uncles. Every one of these two methods is a rule of division. The first, however, is of the division of the shares in the root of the case by (the number of) each class or set; the second is of the division of the multiplicand in the original case by the number of (each of) the sets.—Sharífiyyah, page 71. Illustration.

CXIII. Another method is by the way of proportion, which is the clearest; and it is this, that a proportion be ascertained for the shares of each class *Principle.*

* Sharífiyyah, page 71.

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from the root of the case to the number of persons one by one, and that, according to such proportion from the multiplied (number), a share be given to each individual of that class (*w*).—Sirájiyyah, page 30.

Illustration.

(*w*.) Thus, in the root of the case, which is prime or incommensurable, if you ascertain the proportion of each of the wives, out of the portion (=3) of them two, it will be found to be one and half, and then if in proportion to this (one and half) you give to each of them a portion out of the multiplied number (210), it will amount to three hundred and fifteen. If you likewise ascertain the proportion (of each) of the daughters in their shares, which are sixteen in reference to ten, the number of their persons, the same would be found to be one and three-fifths, then if you give to each of the daughters in proportion to one and three-fifths with respect to the said multiplied number (210), her portion would be three hundred and thirty-six. In like manner, if you ascertain the proportion of (each of) the six female ancestors in their shares, which are four, in reference to the number of their persons, which is six, the proportion will be two-thirds of one, then if you give to each of them two-thirds of the multiplied number (the portion) for her will be one hundred and forty. And if you ascertain also the proportion of (each of) the uncles in their share, which amounts to one, in reference to the number of their persons, which is seven, the proportion will amount to a seventh part of one, so if you give to each of them a seventh part of the multiplied number, his portion will amount to thirty.—Sharífiyyah, page 71.

LECTURE VI.

ON INCREASE AND RETURN.

Preliminary remarks on Increase.

WHERE upon dividing a property according to the first way already shown,*—that is, by six, twelve or twenty-four (as the case may be,) the fixed share of a whole class, or, of a person, who (is not an individual of a class, but) stands singly as a separate claimant, falls short, or becomes smaller than what it should be, then the divisor is increased so that all may get their shares (though proportionately diminished). For instance, in the case of a woman leaving her husband, both parents, and a daughter, the estate of the deceased should, according to principle xcii, be divided into twelve parts,* out of which the husband having taken his fourth, or three, and the parents one sixth, or two, each, there remain only five shares for the daughter instead of six or half, which (in this case) is her fixed share, the number twelve is therefore increased to thirteen, whereby all the claimants are enabled to get proportionately their respective shares; that is to say, the husband gets his four parts, the mother her two, the father his two, and the daughter her six parts or half, of the estate.

The difference between the Arrangement† and the Increase is this, that recourse is had to the former where the number of the divisor is adequate to the shares of all the classes in the case,‡ but the shares allotted to each class do not

* See *ante*, page 202 *et seq.*

† See *ante*, pages 207, 208 *et seq.*

‡ The number of each of the divisors (six, twelve, and twenty-four,) is fixed in proportion to the shares occurring in every one of the cases in which recourse is to be had to the same, which therefore is always adequate to the shares occurring in any of such cases; for instance, where a fourth (which is

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quadrate with the shares of the individuals of that class; whereas in the latter, the number of the divisor itself is not adequate to the portions of a particular class, or of a particular person who stands alone as a separate claimant. Although recourse is had to increasing the number of a divisor in cases like the above, yet any number cannot be raised to any, but to the particular number or numbers which the law has fixed upon inquiry and in consideration of the cases wherein different shares and rights occurred together. Thus, in consideration of the cases that have occurred or may possibly occur, the divisor six is increased or raised to seven, eight, nine, or ten (as a particular case may require,) but not to any number higher than ten; the divisor twelve is raised to thirteen, fifteen or seventeen, and to no more; and the divisor twenty-four is raised to twenty-seven, where a case like that of the *membariyah** may occur: according to Ibnu Masúd, however, it may be raised also to thirty-one; but his opinion is not followed in practice.

Preliminary remarks.

Where there are sharers and no residuaries, and there is a surplus after allotment of the fixed shares to the sharers, there the surplus reverts to those of them who are heirs not for a special cause (as the husband or wife), but by consanguinity.† This reverting of the surplus is called 'Return.' The Return is said to be converse of the Increase; because although the process of increasing the divisor or the root of the case to a certain extent is denominated 'The Increase,' yet in reality it is decreasing the portion which each party was entitled to have from the divisor. For instance, in the case of there being a husband, two daughters and a mother, the divisor is twelve, or the property is divided into twelve parts,‡ of which the husband having taken his fourth or three, the mother her sixth or two, there remain only seven for the two daughters instead of eight or two-thirds (of twelve,) to which by law

On Return and Increase.

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one of the first series of shares) is mixed with all or any of the shares of the second series, (viz., two-thirds, one-third, and one-sixth,) there the estate is to be divided by twelve, and twelve is adequate to the portions of classes of the heirs occurring in any of such case, though the same may not, (in some or several of those cases), quadrate with the shares of the individuals of each class.

* See *post*, page 231.

† *Vide* Principles cxxi & cxxii, pages 233 & 234.

‡ See *ante*, page 202.

they are entitled. To satisfy, therefore, all the claimants, twelve is raised to thirteen, of which eight go to the daughters, three to the widower, and two to the mother. Thus the daughters instead of getting eight of twelve, get eight of thirteen, and the husband and mother instead of three and two of twelve get the same of thirteen, each suffering a partial or trifling loss as regards his or her portion of the original divisor (twelve,) though not of the estate itself, whereas in the case of *Return*, the claimants entitled thereto get, in excess of their fixed shares, portions of the surplus also in proportion to their respective rights.

Return is made in four cases: First,—where there is only one class of sharers, unassociated with a sharer (that is, husband, or wife) who is not entitled to a return; Second,—where there are only two or three* classes of sharers unassociated with a sharer not entitled to a return; Third,—where there is only one class of sharers, associated with a sharer not entitled to the return; and Fourth,—where there are only two classes* of sharers associated with a sharer not entitled to claim the return. So the third and fourth cases of return differ respectively from the first and second only in having a claimant not entitled to a return, as the latter differ from the former in not having any such claimant.

In the cases of Return, the general mode of distributing an estate among its claimants is, that, first the fixed shares are allotted to them, and then the surplus is given to those of them who are entitled to a return: thus in the instance

* With respect to the second case, the principle is thus laid down in Macnaghten's Principles of Muhammadan Law: "Secondly, where there are two or *more* classes of sharers unassociated with those not entitled to claim a return." But the Muhammadan lawyers have, in this case, limited the classes of sharers to *three* and to no more, as will be known by referring to the Principle No. cxxiv. Again, with respect to the fourth case, the learned Compiler says: "Fourthly, where there are two or *more* classes of sharers, associated with those not entitled to claim the return;" but here the classes of sharers have been limited to *two* only. Thus the Durr-ul-Mukhtár: "The fourth is where there is with the second case that is with *two* classes and no more (as ascertained by enquiry) of the persons entitled to a return, &c." Again in another part of the same authority it is laid down that 'by the second (case) is intended some (*i. e.*, *two*, and not all the three classes) comprised therein. Sharíf in his Commentary on the Sirájiyyah says also to the same effect. Thus we are warranted in saying that the term '*more*' used by the said Compiler in the second and fourth rules is not quite correct.

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of there being a husband and a daughter, the estate must be divided into four to give one-fourth to the husband (who, in this case is not entitled to a return,) and after he has taken one of four, or a fourth, which is his legal share, two (or half of the estate) will go to the daughter as her fixed share, then the remaining one, or one-fourth, will return or revert to her, she being entitled also to the same. And where there occur sharers entitled to shares of both series, there the estate may be divided in the first instance either by six, twelve, or twenty-four as the case may require; and after giving the share of the person not entitled to a return, the fixed shares of the classes or individuals entitled to return may be first given, and then the surplus, if any, may be distributed among them in proportion to their respective rights. But as there are cases in which the fixed shares as well as the surplus cannot be distributed without a fraction, the Muhammadan lawyers have laid down certain rules or principles to which recourse should be had in arranging the cases of return.

Principle. CXIV. The Increase (*Oul*) is the adding of something to the divisor out of its own portions: this takes place when a divisor falls short of the shares (required).*

Principle. CXV. The divisors are seven in number, namely, two, three, four and eight; six, twelve and twenty-four, of which only the last three are increased.—*Vide* Sirájiyyah, page 24.

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cxiv. Increase (*oul*) is contrary to return, as will be presently mentioned. It is the adding of a share or shares when the divisor falls short of the shares (required,) so that there is a decrease or loss to all the parties

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* The above is the true translation of its original, which runs thus:—"*Al-oulu an yuzáda alá al makhirji shayun min ajazáyhi, izá záká al makhrijn an farzin*;" but this has been differently rendered by Sir William Jones: the same is as follows: "*Oul* or *increase* is, when some fraction remains above the regular divisor, or when the divisor is too small to admit one share."—*Vide* Sirájiyyah, page 32.

The increase is where there is a certain number of legal sharers, each of whom is entitled to a specific portion, and it is found, on a distribution of

CXVI. The divisor six is increased up to ten by the addition of odd as well as even numbers (*a*).* *Vide* Sirájiyyah, page 24. LECTURE VI. *Principle.*

(*a*.) That is, it is increased to seven by (the addition of) a sixth part of it in the case where the shares occurring together are a half and two-thirds,—as (in the case of) a woman leaving her husband, two sisters by the same father and mother; or (in the case of) two halves and a sixth part occurring together,—as in the case of a husband, a sister by the same father and mother, a sister by the same mother only, or a sister by the same father only (surviving a deceased woman). It is increased to eight by (the addition of) a third part of it, in the case where the portions occurring together are one-half, two-thirds, and one-sixth part,—as (on the survival of) a husband, two sisters of the whole blood, and a mother; or where two- Explanation, &c.

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in proportion to their shares, like the proportional decrease or loss to the creditors in proportion to the assets. *Umar* was the first who laid down the principle of *Increase*.—Durr-ul-Mukhtár, page 877.

To a case of this kind the rule of the *oul*, or increase, is applicable, according to the majority of the companions; and it consists in raising the shares of the property, to the numbers of the shares of the sharers, by which means the deficiency is distributed over all the sharers in proportion to their respective shares.—Fatáwá Alamgírí, vol. vi, page 651. B. Dig., 713.

cxvi. The (divisor) six is increased to ten by the addition of four either by odd or even numbers. Thus it is increased to seven in the case of there being a husband and two whole sisters;—to eight, in the case of those persons and another;—to nine, in the case of those persons and a brother by the same mother only;—and to ten in the case of those persons and another brother by the same mother only (being left by a woman at her death).—Durr-ul-Mukhtár, page 868.

shares into which it is necessary to make the estate, that there is not a sufficient number to satisfy the just demands of all the claimants.—Macn. Princ., M. L., Chap. I, Sect. vii, Princ. 88.

It takes effect in three cases; either when the estate should be made into six shares, or when it should be made into twelve, or when it should be made into twenty-four.—*Ibid*, Princ. 89.

* Where six is the number of shares into which it is proper to distribute the estate, but that number does not suit to satisfy all the sharers without a fraction, it may be increased to seven, eight, nine or ten.—Macn. Princ., M. L., Princ. 67.

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halves, and one-third occur together,—as (when) a husband, a sister by the same father and mother, and two sisters by the same mother only (are left by a woman at her death). It is increased to nine by (the addition of) one-half of it, where the portions occurring together are one-half, and two-thirds and one-third,—as (in the case of the survival of) a husband, two sisters by the same father and mother, and two sisters by the same mother only; or where two-halves, one-third and one-sixth occur together,—as (in the case of) a husband, a sister by the same father and mother, two sisters by the same mother only, and a mother (being left by a woman). It is increased to ten by (the addition of) two-thirds of it where the portions occurring together are one-half, two-thirds, one-third, and one-sixth,—as (when) a husband, two sisters by the same father and mother, two sisters by the same father only, and a mother (survived a deceased woman). This (last) case is named 'Shuraihiyah;' since Shuraih decided a case in which he allotted three shares to a husband out of ten, and the husband complained throughout the town, asking the people "a woman left a husband, and not a son, and son's son, what then is the portion of the husband?" And they said: "half." He then said, "Shuraih has allotted to me neither half nor a third." This news reached him (Shuraih), and he summoned the man, and reprimanding him, said: "I have learned this precept (decision) from the just and upright Imám," by which he meant Umar.—Sharífiyyah, page 57.

Principle. **CXVII. But twelve is raised up to seventeen by odd, and not by even, numbers (*b*).*—Sirájiyyah, page 24.**

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cxvii. Twelve is increased or raised three times up to seventeen by odd, not by even, numbers: It is increased to thirteen, as (in the case of there being) a widow, two whole sisters, and a mother; to fifteen, as (in the case of there being) those persons and a brother by the same mother only; and to seventeen, as (in the case of there being) the said persons and another brother by the same mother only.—Durr-ul-Mukhtár, page 868.

* Where twelve is the number, and it does not suit, it may be increased to thirteen, fifteen or seventeen.—Macn. M. L., Chap. I, Sect. iv, Princ. 68.

(*b.*) That is, it is raised to thirteen by the addition of half of a sixth part of it, where (the shares which) occur together (are) a fourth, two-thirds, and one-sixth,—as (in the case of) a widow, and two sisters by the same father and a mother. It is raised to fifteen by the addition of a fourth part of it, where a fourth, two-thirds and a third occur together,—as (in the case of) a widow, two sisters by the same father and mother, and two sisters by the same mother only; or where a fourth, two-thirds and two-sixths occur together,—as (in the case of) a widow, two sisters by the same father and mother, a sister by the same mother only, and a mother; and it is increased to seventeen by the addition of a fourth and sixth part of it, where a fourth, two-thirds, one-third and one-sixth occur together,—as (in the case of) a widow, two sisters by the same father and mother, two sisters by the same mother only, and a mother (surviving the deceased).—Sharífiyyah, page 58. *Explanation, &c.*

CXVIII. And twenty-four is raised to twenty-seven by one increase only,—as in the *Membariyyah* (*c*) case, (in which an eighth, two-thirds, and two-sixths occurred together, and*) in which a wife, two daughters and both parents (were left by a man).†—Sirájiyyah, page 24. *Principle.*

(*c.*) It is called '*Membariyyah*,' because a question was put to Alí when he was on the pulpit (*membar*) at Kúfah, and he answered it *extempore*, upon which the person who put the question said in a sarcastic manner, "is not an eighth part for the wife?" To this he replied, "the eighth has become (is converted into) ninth," and resumed the preaching. The people became astonished at his learning.—Sharífiyyah, page 58. *Explanation.*

The authority for limiting the increase to what is above mentioned is based upon the grounds found by inquiry into the cases where different shares or rights occurred together.—Sharífiyyah, page 58.

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* Sharífiyyah, page 58.

† Where twenty-four is the number, and it does not suit, it may be increased to twenty-seven.—Macn. M. L., Chap. I, Sect. iv, Princ. 68.

LECTURE VI.

Principle Of Return.

CXIX. The Return is the converse of the Increase;* since by the latter, the portion of the sharers are decreased and the root of the case is increased;† whereas by Return the shares are increased and the root of the case is decreased, or, in other words, in an increased case, the shares exceed the root of the case, while in that of Return, the root of the case exceeds the quantum of the shares.—Sharífiyyah, page 77.

Principle.

CXX. What remains over and above the shares of those entitled to them, when there is no legal claimant thereof (out of the residuaries‡), the same is returned to the sharers according to their rights, except to the husband or wife (*d*).§

"This (says the author of the Sirájiyyah,) is the opinion of all the Prophet's Companions, and our masters have adopted this (doctrine)."—*Vide* Sirájiyyah, page 32.

Principle.

CXXI. All persons to whom there may be a return made are thus seven in number,—the mother, the

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cxix. The Return is the converse of the Increase. If there is a surplus above the shares, and there is no residuary heir, then that surplus is returned to the sharers in proportion to their shares: excepting, however, the husband or wife, to whom there is no return. This is the opinion of all, in consequence of there being violence (insecurity, or irregularity) in the public treasury.—Durr-ul-Mukhtár, page 868. See, however, pages 233 & 234, and the following remarks by the Commentator of the Durr-ul-Mukhtár itself:—"But Usmán says, that it will return to them (*i. e.*, husband and wife) also; and I say, that it is laid down in the 'Ashbáh,' that in our time the surplus is returned to them on account of irregularity or insecurity in the Public treasury."—Durr-ul-Mukhtár, page 868.

* Sirájiyyah, page 32. Durr-ul-Mukhtár, page 868.

† See *ante*, page 228 *et seq.*

‡ Sharífiyyah, page 77.

§ See *ante*, page 91, and *post*, pages 233 & 234.

grandmother, the daughter, son's daughter, full sister, half sister by the father, or half brother or sister by the mother (*d*); and a return may take place to one, two, or three classes of sharers, but not to more.—Fatáwá Alamgírí, vol. vi, page 651.—B. Dig., page 715.

Zayid, the son of Sábit (or Thábit), however, says, "the surplus (does not revert to the sharers, but*) goes to the Public treasury, and to this opinion have assented Urwah and Zahurí, as well as Málik and Sháfií."†—Sirájiyyah, page 32.

(*d*.) The above was determined by the ancient lawyers, namely, by some of the Prophet's companions and their followers, as well as by the Mujtahid† Imáms, who followed them in the age when there was no irregularity in the Public treasury (Bayit-ul-mál), nay it was secure from violence and loss. But many of the modern lawyers eminent in learning, seeing that there was injustice done by the rulers and their officers in not applying the (deposited) wealth to the proper objects, have decided that return should be made also to husband and wife. The principal of those modern lawyers are Moulánáa Zayn-ul-Abidín, Ibráhím Bin Najúm, an Egyptian, who in the (Chapter of Inheritance, contained in the second part of his work, entitled) 'The Ashbah-o-Nazáyïr' (or Doubts and Precedents), has cited the *dicta* of Zaylayí, part of which is that "what remains after (giving) the share to one of the married couple, will return or revert to him or to her." And it is laid down in the Tahtáví that, according to Usmán, return is made also to a husband or wife. Accordingly, Ibnu-Fannárí says: "It has been declared that in our time the Fatwá or decision is as the above, by reason of there being violence practised in the Public treasury. It is also laid down in the Zakhírah that the surplus remaining after allotment of the share of a husband or wife, will not be placed in the public treasury, but given to him or to her, because, of the relatives for a special cause, he or she is the nearest of all others." Imám Abd-ul-Wáhid, a martyr, has, in his Book on Inheritance, also

Remarks.

* Sharífiyyah, page 77.

† See the Introductory Lecture, pages 9, 10, 29, 30 & 47.

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laid down that 'the surplus of the share of a husband or wife is not to be placed in the public treasury, but to be given to him or to her, since he or she is the nearest of the relatives (for a special cause).' The above is cited also in the Hammádiyah. What is laid down by *Ahmad* the son of *Yahiyah* the son of *Saád Taftazání* is, therefore, prevalent in the present age.* It is as follows:—

Principle.

CXXII. Most of the learned have decided that return is to be made to (either of) them, (viz., husband and wife), where there is no near relative other than he or she.*—See *ante*, page 91.

Return is made in four cases:—

Principle.

CXXIII. The first of them is, when there is in the case but one sort of kinsmen, to whom return must be made, and none of those (*i. e.*, neither husband nor wife) who is not entitled to a return, then settle the case according to the number of their persons.† (*e*)—Sirájiyyah, page 32.

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cxxiii. The cases of return are in four divisions:—The first is composed of one class of persons to whom return is made; as two daughters, or two sisters, or two female ancestors: in this, the division must be made at once according to the number of their persons in order to avoid the lengthy process.—Durr-ul-Mukhtár, page 868.

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* The above is an abstract of the note by Abú-ul-Kásim Abd-ul-Hakím contained at pages 6—9 of Moulaví Kabír-ud-dín's edition of the Sirájiyyah and Sharífiyyah, q. v.

Hence, at present, the settled law is that return is made to husband or wife, *not* when there is any sharer by consanguinity, but when there is none such.

† It takes place in four cases:—

First, where there is only one class of sharers unassociated with those not entitled to claim the return, as in the instance of two daughters, or two sisters; in which case, the surplus must be made into as many shares as there are sharers, and distributed among them equally.—Macn. Princ., Chap. I, Sect. viii, Princ. 92.

(*e.*) As in the case of there being only two daughters or two sisters, two-thirds of the estate devolve on them as their legal shares, and the remaining one-third returns or reverts to them in equal shares, there being no other claimant, so instead of first giving them two-thirds (one-third to each) and then dividing between them the remaining one-third in equal shares, the estate is at once divided in equal moieties, and one moiety is given to each of them. Illustration.

CXXIV. The second case is, when there are two or three classes of those persons to whom return must be made, unassociated with any of those (*i. e.*, husband or wife) to whom there is no return. Then settle the case according to their shares:—that is, by two, if there be two-sixths in the case (*f*); or by three (that is, you will make the division by three*), when there are a third and a sixth in it (*g*); or by four, when there are a moiety and a sixth in it (*h*); or by five, when there are in it two-thirds and a sixth (as in the instance of there being two daughters and a mother*), or half and two-sixths (as in the instance of there being a daughter, a son's daughter, and a mother*) or (when there are in it*) half and a third [as in the instance of there being a full sister and two sisters by the same mother only, or a full sister and a mother*] (*i*)†.—Sirájiyyah, pages 32 and 33. *Principle.*

(*f.*) As where a grandmother and a sister by the same mother only are left by the deceased; you will divide the Illustration.

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cxxiv. The second is, when there are two or three and no more of those to whom a return is to be made, then (the division must be made) according to the number of their shares: that is, by two when there are two-sixths (in the case),—by three, when there are a third and a sixth,—by four, when there are a moiety and a sixth,—by five, when there are two-thirds and a sixth. This is to shorten the long (arithmetical process).—Durr-ul-Mukhtár, pages 868, 869.

* Sharífiyyah, page 80.

† Secondly, where there are two or more classes of sharers unassociated with those not entitled to the return,—as in the instance of the mother and

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estate between them in moieties: thus one-half of the estate will go to each of them (as every one of them was originally entitled to an equal share, namely, a sixth).—Sharífiyyah, page 79.

Illustration.

(*g.*) As when there are two children of the mother and the mother herself. In this instance, the root of the case is six, but the shares to be received by the heirs aforesaid are three: so (here) you will make this (three) the root of the case, and in proportion with those shares divide the property in thirds, thus two-thirds of the property will go to the mother's children (one-third to each,) and one-third to the mother.—Sharífiyyah, page 79.

Illustration.

(*h.*) As when there are a daughter and son's daughter, or a daughter and mother: in this example also the root of the case is six, and the number of the shares to be received out of them is four, (three going to the daughter and one to the son's daughter, or to the mother,) you will make the division by four and allot the property in fourths, three-fourths to the daughter, and one-fourth to the son's daughter, or to the mother.—Sharífiyyah, page 79.

Illustration.

(*i.*) The division in these three instances is also by six, and the shares receivable therefrom are five. Now as in the first (instance or example) four shares go to the daughters, and one share goes to the mother; therefore, the property left by the deceased should be divided into five shares, four of which go to the two daughters, and one goes to the mother. In the second instance, there are three sorts (of heirs,) and the shares (to be) received by them, out of six, are also five, three of them going to the daughter, one to the son's daughter, and one to the mother; the property should, therefore, be divided amongst them into five parts in proportion to their shares,—three of those five going to

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two daughters, the surplus must be made into as many shares as may correspond with the shares of inheritance to which the parties are entitled, and distributed accordingly. Thus, the mother's share being one-sixth, and the two daughters' share two-thirds, the surplus must be made into six, of which the mother will take two, and the daughters four.—Macn. Princ., M. L., Chap. I, Sect. viii, Princ. 93.

This appears to be inaccurate, as well as insufficient, as will be known by comparing it with the above principle of the Sirájiyyah and Sharífiyyah. See also Preliminary Remarks, page 227, *note*.

the daughter, one-fifth part to the son's daughter, and the other fifth to the mother. In the third instance, too, the shares (to be) received out of six are five, for three shares go to the sister of the whole blood, and two to the two sisters by the same mother only. In like manner, two shares go to the mother (when she happens to be) with a sister of the whole blood; consequently, you will make five the root of the case, and divide the property into five (shares). All this is to shorten the long arithmetical process.—Sharífiyyah, page 80.

Principle.

CXXV. The third is, that when, in the first case, (that is, in the case of there being one sort of kinsmen to whom return is to be made,*) there is any person (*i. e.*, husband or wife) to whom no return is to be made (*j*), then give the share of the person to whom there is no return, according to the lowest denominator of his or her (share), and divide the remainder of the denominator according to the number of those to whom return is (to be) made (*k*).† And if the residue exactly quadrate with the number of the persons entitled to a return, it is well;—as

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cxxv. The third is, when there is with the first, (that is with the first sort of kinsmen,) a person not entitled to a return, namely, a husband or wife, (then) give the share of him or her to whom there is no return according to the lowest denominator, and divide the residue according to the number of the persons to whom return is to be made;—as in the instance of there being a husband and three daughters.—Durr-ul-Mukhtár, page 869.

* Sharífiyyah, pages 80 & 81.

† Thirdly, when there is only one class of sharers, associated with those not entitled to claim the return, as in the instance of three daughters, and a husband; in which case the whole estate must be divided into the smallest number of shares of which it is susceptible; consistently with giving the person, excluded from the return, his share, (which is in this case four,) and the husband will take one as his legal share, or a fourth, the remaining three going to the daughters as their legal shares and as the return, but if it cannot be so distributed without a fraction, as in the case of a husband and six daughters (three not being capable of division among six), the portion must be ascertained between the shares and sharers.—Macn. Princ., M. L., Chap. I, Sect. viii, Princ. 94.

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in the instance of there being a husband and three daughters ; but if it (the residue*) do not quadrate with the number of the persons of those (to whom return is made,*) then multiply the measure of the number of these persons, if there be an agreement between the number of the persons and the residue, into the denominator of the shares of those to whom no return is to be made, (and the product will settle the case,*)—as in the instance of there being a husband and six daughters (*l*); if not, (that is, if there be no agreement between the number of the persons and the residue,*) then multiply the whole number of their persons into the denominator of the shares of those to whom there is no return, and the product will set the case right;—as in the case of there being a husband and five daughters (*m*).—Sirájiyyah, page 33.

Explanation.

(*j*.) That is, when with one sort of kinsmen to whom return is made there is a wife, or husband, to whom no return is made.—See Sharífiyyah, page 80.

Explanation.

(*k*.) I mean according to the number of this sort of kinsmen, just as you divide the whole of the property according to the number of the heirs, when they become separate from the person to whom there is no return.—Sharífiyyah, page 81.

Explanation.

(*l*.) For the lowest denominator, according to the share of him to whom there is no return, is four, and if you give one out of the same to the husband, there remain three which do not quadrate with six, the number of the daughters; but between them there is agreement in third, for (in the arithmetical process), regard is paid to the *tadákhul*, as you have already known; so multiply the measure of the number of those persons, which is two, into four, and the product will be eight, of which—two will go to the husband and six to the daughters.—Sharífiyyah, page 81.

Explanation.

(*m*.) In this, as in the two preceding instances, the root of the case is twelve, on account of there occurring a fourth

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* Sharífiyyah, pages 80 & 81.

and two-thirds together,* but, like the above two, it is a case of return, and consequently the division should be by four, the same being the lowest denominator according to the share of the person to whom there is no return. Now if we give one out of the same to the husband, there remain three, which do not quadrate with the five daughters,—nay there is a disagreement between them and the number of the persons; the whole number of the persons is, therefore, multiplied into (four), the denominator of the share of the person to whom there is no return, and the product, which is twenty, will settle the case: (originally,) the husband had one, we multiply it into five, and get five, which we allot to him; the daughters had three, we multiply the same into five and gain fifteen,—of which three go to each of them.—Sharífiyyah, page 81.

CXXVI. The fourth is, when in the second case,† (that is the case in which there are two sorts of those to whom return is to be made‡), there is any, (*i. e.*, husband or wife) to whom no return is (to be) made; then divide what remains from the denominator of the share of the party to whom there is no return, by the case (or portion) of those to whom return must be made, and, if the remainder quadrate, it is well, (there is no need of multiplication;‡) and this is in one form only, that is, when a fourth goes to wives, and the residue is (distributed) in thirds among those entitled to a return,—as in the instance of (there being) a wife, four grandmothers, and six

Principle.

ANNOTATIONS.

CXXVI. The fourth is, when there is with the second class, that is with two sorts and no more (as ascertained by inquiry,) of the persons entitled to a return, any to whom no return is made, then divide the remainder of the denominator of the share of the person, to whom there is no return, into the denominator of the shares of those entitled to a return.—Durr-ul-Mukhtár, page 869.

* See *ante*, pages 82, 83.

† By the second (case) is intended some (*i. e.*, two,) and not all (the three) comprised therein.—Durr-ul-Mukhtár, page 869.

‡ Sharífiyyah, pages 82, 83.

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sisters by the mother's side (*n*). But if it (that is, what remains from the number of the denominator of the persons not entitled to a return,*) do not quadrate, then multiply the whole case of those, who are entitled to a return, into the denominator of the share of the person not entitled to a return, and the product will be the denominator of the shares of both classes, (that is, the class entitled to a return, and that not entitled thereto,*)—as (in the instance of there being) four wives, nine daughters, and six female ancestors (*o*).†—Sirájiyyah, page 33.

(*n*.) For the lowest denominator, according to the share of the person not entitled to a return, is four, out of which, if the wife receive one, there remain three, which here quadrate with the portion (=3) of the persons entitled to a return, inasmuch as the sisters by the same mother only are entitled to one-third, and the grandmothers to a sixth; consequently, two go to the sisters, and one goes to the grandmothers. But the portion of the four grandmothers being one, does not quadrate with them, and there is disagreement between them (*i. e.*, their number and portion;) so we reserve the number of their persons; two, the portion of the six sisters, do not likewise quadrate with their

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* Sharífiyyah, pages 82, 83.

† Fourthly, where there are two or more classes of sharers, associated with those not entitled to claim the return,—as in the instance of a widow, four paternal grandmothers, and six sisters by the same mother only; in which case the whole estate must be divided into the smallest number of shares of which it is susceptible, consistently with giving to the person excluded from the return her share of the inheritance, (which is in this case four). Then, after the widow has taken her share, there remain three to be divided among the grandmothers and half-sisters; but the share of the grandmothers is one-sixth, and of the half-sisters one-third; and here, to give them their portions, the remainder should be made into six; but a third and a sixth of this number amount to three, which agrees with the number to be divided among them, of which the half-sisters will take two and the grandmothers one. Had there been only one grandmother, and only two half-sisters, there would have been no necessity for any further process, as the grandmothers would have taken one-third, and the two half-sisters the other two-thirds. But it is obvious, that two shares cannot be distributed among the six half-sisters, nor one among the four paternal grandmothers, without a fraction. To find the number into which the remainder should be made, recourse must be had to the seventh principle of distribution.—Macn. M. L., Chap. I, Sect. viii, Princ. 95.

number, but there is an agreement in half between the number of their persons and that of their portion, so we reduce the number of the persons of those sisters into half, which amounts to three, and then we see if there is agreement between persons and persons (*i.e.*, the grandmother and sisters,) but as we do not find it, we multiply the measure of the number of the sisters, which is three, into the whole number of the grandmothers, which is four, and the product is twelve; next we multiply this into four, which is the denominator according to the share of the person not entitled to a return, and the product gained is forty-eight, by which the case is settled: (originally,) the wife had one, which multiplied into twelve, the multiplicand, gives the identical number, the same, therefore, is given to the wife; the grandmothers also had one, which multiplied into the said multiplicand amounts to twelve; consequently, each of the grandmothers is to have three; the sisters by the mother's side had two, which multiplied into the above (multiplicand,) amounts to twenty-four; each of those (sisters) is, therefore, to have four.—Sharífiyyah, page 83. LECTURE VI.

(*o.*) The root of this, as already mentioned, is twenty-four, by reason of an eighth being mixed with two-thirds and a sixth;* but this being a case of return, we convert it into eight, the lowest denominator of the share of the person not entitled to a return, and when we have given an eighth thereof to the wives, there remain seven which do not quadrate with five, which here form the root of the case of those entitled to a return, (their portions being two-thirds and one-sixth); nay, there is disagreement between them (*i.e.*, the remaining seven and five the root of the case of those entitled to a return); consequently, the whole (number) of the case of those entitled to a return, that is five, must be multiplied into eight, the denominator of the share of the persons not entitled to a return, and the product, which is forty, is the denominator of the shares of both classes.—Sharífiyyah, page 83. Explanation.

Now, if you wish to know the share of each of those classes from the above product, which is the denominator of

* See *ante*, page 202.

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their shares,* then multiply the shares of the persons to whom no return should be made, into the case of those to whom there is a return,† and the product will be the portion of the person not entitled to a return, out of the product aforesaid;* multiply also the shares of all of that class who are entitled to a return into the remainder of the denominator of the share of the persons not entitled to a return, and the product will be the portion of the class entitled to a return† (*p*); but as the same will not quadrate with the individuals of (each of) those classes, you must, therefore, set the case right according to the seven rules already laid down‡ (*q*) in the section on arrangement.

Explanation.

(*p.*) In the foregoing instance, the wives had one out of the root of the case, and we multiply it into five, which is the root of the case of those entitled to a return, and the product, amounting to five, is the portion of the wives out of forty; the nine daughters had four out of the root (=5) of the case of those entitled to a return, so when we multiply it into seven, which remained out of the denominator of the share of the persons not entitled to a return, the product will be twenty-eight, which is for them out of forty; and the female ancestors had one out of (five) the root of the case of the persons entitled to a return; so if we multiply it into seven, the product, which also is seven, is for the female ancestors. By this process, the shares of the persons not entitled to a return, as also of each of the classes entitled to a return, would quadrate.—Sharífiyyah, page 84.

Explanation.

(*q.*) Thus, out of forty, in the case cited, the four wives had five (as) their portion, but there being disagreement between their persons and shares, we reserve the entire number of their persons: the nine daughters had twenty-eight, but there being disagreement between their persons and shares, we leave (reserve) the number of their persons in the same state; and the portion of the six female ancestors amounting to seven, and there being disagreement between the two (*i.e.*, their persons and shares,) we take (reserve) the number of their persons entire. Then

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* Sharífiyyah, page 84.

† Sirájiyyah, page 33.

‡ Durr-ul-Mukhtár, page 870.

we see if there is agreement between persons and persons, and we find that there is agreement in half between the persons of the female ancestors and those of the wives, so we multiply half of four into six and gain twelve, which agree in three with nine, the number of the daughters, and then we multiply a third of nine into twelve and gain thirty-six, which product also we multiply into forty, and get one thousand four hundred and forty, by which the case is adjusted as regards the shares of each class; inasmuch as, out of forty, the wives had five, which being multiplied into the multiplicand, thirty-six, the product amounts to one hundred and eighty; so there will be forty-five for each of the wives: the daughters had twenty-eight as their portion, the same being multiplied into the multiplicand in question, and the product amounting to one thousand and eight, they are to have one hundred and twelve each: the female ancestors had seven, which we multiply into the said multiplicand and the product is two hundred and fifty-two, so forty-two go to each of the female ancestors.—Sharífiyyah, page 84.

LECTURE VII.

ON VESTED INTERESTS—SUBTRACTION—DIVISION AMONG HEIRS AND CREDITORS, AND PARTITION.

Preliminary remarks on vested interests.

If a person die leaving heirs, and then if any of these heirs die before distribution of the estate leaving relatives, who, or some of whom, are heirs of the first deceased, as well as of the second, or only of the second, then those heirs are considered to have vested interests in the inheritance; that is to say, those of them who are heirs of the second deceased as well as of the first, have vested interests in, and are to have shares of, the heritage of both the deceaseds; and those who are heirs only of the second deceased, have vested interests in, and are to get shares of, the heritage of the latter alone. For instance, where a land-owner died leaving a son, a daughter, and a half-brother by the same father only; and after his death, but before partition of the estate, died the son leaving his sister, and paternal uncle, there, in the first instance, two thirds of the estate vested in the son, and one-third in the daughter; then on the death of the son, one of the two-thirds, vested in him, goes to his sister, and the other to his uncle. Thus, the daughter who is heir to both her father and brother gets two-thirds of the estate,—one-third on her father's death, and one-third on the death of her brother (the same being half of the two-thirds that were vested in, and left by, him), and the uncle gets the remaining one-third or half of the portion of his nephew, the second deceased. Eventually, therefore, the estate left by the common ancestor, the first deceased, will be divided into three parts, of which the daughter will get two-thirds,—one by right as his daughter, and another by right as his son's sister, and his brother will get the remaining one-third by right as his son's uncle and residuary heir. There are, however, cases of vested interests which are not so simple as the above by reason of several deaths occurring before

any distribution of the estate (left by the first deceased) could take place. Principles or Rules have, therefore, been laid down by the Muhammadan lawyers according to which division of vested inheritances must be made. LECTURE VII.

CXXVII. There occur cases in which some of the shares become vested interests before the distribution (of the estate);* that is, where a person dies leaving heirs, and then any of these heirs die before any partition of the estate, leaving relatives who, or some of whom, are heirs only to the second deceased, and some to the first deceased also, there the surviving heirs are considered to have vested interests in the inheritance. *Principle.* Of vested interests.

As where, before partition of the joint estate, a woman dies leaving her husband, a daughter and mother (1); Example.

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cxxvii, cxxviii. If some of the heirs die before distribution of the property left (by the deceased), the case of the first (deceased) should be arranged, and the share of each heir given; next, the (case of the) second (deceased) should be arranged, except when they agree with each other, as if a man died leaving ten sons, and then one of them died. So if the portion of the second deceased quadrate with the arrangement thereof, it is well and good.—Durr-ul-Mukhtár page 872.

* *Vide* Sirájiyyah, page 36.

(1) First we may suppose that Zaed had two wives, named Zaineb and Latifa, and that Zaineb died possessed of separate property, leaving her husband, her mother Zuhra, and Hinda, her daughter by a former husband: now the legal shares, in order as the shares are named, would be a fourth, a sixth, and a moiety; so that regularly the estate should be divided into twelve parts, but it is here divided into four, because there must be a return to Zuhra and Hinda in the proportion of their shares, that is as one to three; but when Zaed has taken his fourth, the three-fourths, which remain, cannot be distributed in that proportion, and since three and four are prime to each other, therefore, we multiply four, considered as the number of the persons entitled to a return, into four, the denominator of the husband's share, and the square number answers the purpose of integral distribution;—for, of sixteen parcels, Zaed will be entitled to four, Zuhra to three, and Hinda to nine.—Note by Sir William Jones.

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next, the husband dies leaving a wife and both parents (2); then the daughter dies leaving two sons, a daughter and a grandmother—who was the mother of the woman first deceased (3); and then this grandmother dies leaving her husband and two brothers (4).—*Vide* Sirájiyyah, page 36.

Explanation.

In the above exemplification, the author (of the Sirájiyyah) has stated a case comprising three heirs, and then mentioned their successive deaths, and stated the case of the first deceased to be one quadrating with that of the second deceased, and the case of the latter to be one of agreement, and that of the third, one of disagreement.—Sharífiyyah, page 98.

Further explanation.

Here the arrangement of the (case of the) first (deceased) is in the place of the root of the case, and the arrangement

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(2) Suppose next, that Zaed himself dies, before any distribution actually made, leaving only Latifa before mentioned, his mother Basira, and his father Abid; here four parts of the former inheritance having been vested in him, the distribution is easy,—one part going to Latifa as her fourth, one also to Basira as her third of the residue, and two parts to Abid, in exact proportion to their several claims on his own estate.—Note by Sir William Jones.

(3) Thirdly, suppose Hinda to die before any actual distribution, leaving the before mentioned Zuhra, her grandmother, Zubaida, her daughter, and two sons, Hatif and Bashar: now she had a vested interest in nine parts out of the sixteen, and her own estate being divisible into six parts, we observe that nine and six are composit to each other, or agree, as the Arabian phrase is, in a third, so that a third of six, or two, must be multiplied into sixteen, and the product thirty-two will be the denominator for both cases; for, of thirty-two parts, nine will vest in Zuhra (six as mother to Zaeneb, and three as grandmother to Hinda), twelve in the two sons, three in Zubaida, and eight in Zaed's representatives; since to ascertain the share of each individual, the just mentioned shares out of sixteen must be multiplied by two, and those out of six, by three, which is here called the measure of Hinda's vested interest.—*Ibid.*

(4) Let us fourthly suppose, that Zuhra also dies before any distribution, leaving her husband Caab, and two brothers, Calib and Tarif. Now her own estate is arranged by four, the husband taking a moiety, and each of the residuaries one-fourth; but four and nine are prime to each other; and four, therefore, multiplied by thirty-two, produces one hundred and twenty-eight, the denominator of both cases: we must then multiply by four the shares out of thirty-two, and by nine the shares out of four, and the product will be the lots of the several claimants; eight parcels going to Latifa, sixteen to Abid, eight to Basira, forty-eight in moieties to Hatif and Bashar, twelve to Zubaida, eighteen to Caab, and eighteen in moieties to Calib and Tarif—*Ibid.*

of the case of the second is in the place of the persons among whom the division is made, and what was in hand of the second deceased is in the place of their shares from the root of the case; consequently, in the instance of quadrating, the two cases are adjusted by the arrangement of the first.—Sharífiyyah, page 96.

The rules in such cases are as follows:—

CXXVIII. The case of the first deceased is to be arranged according to the preceding rules, and the allotment of each heir (be considered as) delivered according to that arrangement (*a*).—*Vide* Sirá-jiyyah, page 36. *Principle.*

(*a.*) The first (of the examples*) is a case of return, the root of the case being twelve by reason of a fourth, a moiety and a sixth, (occurring together). Now, out of the above, if three be taken by the husband, six by the daughter, and two by the mother, (still) there remains one out of twelve, which must return to the daughter and mother in proportion to their shares; so if we convert the root of the case into the lowest denominator of the person not entitled to a return, it will amount to four, out of which, if one is taken by the husband, there remain three, which do not quadrate with four, the (number of the) shares of the daughter and mother, nay, there is disagreement between them; consequently, those shares must be multiplied into the said lowest denominator, and the product will be sixteen, of which four go to the husband, nine to the daughter, and three to the mother.—Sharífiyyah, page 95. Explanation.

ANNOTATIONS.

cxxxvii & cxviii. Where a person dies and leaves heirs, some of whom die prior to any distribution of the estate, the survivors are said to have vested interests in the inheritance; in which case the rule is, that the property of the first deceased must be apportioned among the several heirs living at the time of his death, and it must be supposed that they received their respective shares accordingly.—Macn. M. L., Chap. I, Sect. ix, Princ. 96.

* Given by the author of the Sirájiyyah as at pages 245 & 246.

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Principle. CXXIX. Next, the case of the second deceased is to be arranged (according to the same rules*), and a comparison made between what was in his hand, (or vested in him*), from the first arrangement, and the second arrangement, in three situations or respects, (namely, equality, agreement, and disagreement*). And if (by reason of equality), what is in hand from the first arrangement quadrate with the second arrangement (as in the 2nd example), then there is no need of multiplication (*b*).—Sirájiyyah, page 37.

Explanation. (*b.*) Next, the four allotted to the husband being divided amongst (his) heirs aforesaid,—one will go to his wife, one-third of the remainder, which also is one, to his mother, and two to his father. Thus, what was in the hand of the husband from the first arrangement quadrated with the second arrangement, and both the cases are adjusted by the first arrangement.—Sharífiyyah, page 96.

Principle. CXXX But if the same (*i.e.*, what was in hand from the first arrangement*) do not quadrate (with the second arrangement*), then see whether there be an agreement between the two (as in the 3rd example), and multiply the measure of the second arrangement

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cxxix. The same process must be observed with reference to the property of the second deceased, with this difference, that the proportion must be ascertained between the number of shares to which the second deceased was entitled at the first distribution, and the number into which it is requisite to distribute his estate to satisfy all the heirs.—Macn. M. L., Chap. I, Sect. ix, Princ. 97.

cxxx. If it (*i.e.*, what was in hand from the first arrangement) do not quadrate, but there be an agreement between the deceased's share and the root of the case, then the measure of the arrangement must be multiplied into the whole of the first arrangement.—Durr-ul-Mukhtár, page 872.

* Sharífiyyah, page 96.

into the whole of the first arrangement (*c*).— Sirájiyyah, page 37. LECTURE VII.

(*c*.) According to the rule which has been laid down in the Chapter on Arrangement, (*viz.*, "If the portions of one class be fractional, yet if there be an agreement between their portions and their persons, then the measure of the number of persons whose shares are broken must be multiplied by the root of the case.") Here, the measure of the second arrangement, which was there in the place of persons, should be multiplied into the first arrangement, which is here in the place of the root of the case, and the product thereof will adjust both cases. As in the (3rd) example (p. 246), when the daughter also died leaving, as aforesaid, two sons, a daughter, and a grandmother, and there remained in her hand nine from the first arrangement, her case is arranged in or by six, and there is between them an agreement in three, consequently, a third of six, which is two, is multiplied into sixteen, and the product, which is thirty-two, is the denominator of both cases. And the shares of those who had their shares out of sixteen, namely, of the heirs of the first deceased, are (separately) multiplied into the measure of the case of the daughter, which is two, and the (different) products are their (respective) shares; also the shares of those who had their portions out of six, namely, (of) the heirs of the second (properly third) deceased, are multiplied into the measure of what was in the hand of the daughter, and the product is their share. The mother of the first deceased had three out of sixteen, which we multiply into two, and the product = 6 is her portion; and the husband had four out of the above, which, being multiplied into two, produces eight, which is his portion and quadrates with his heirs,—two shares thereof going to (his) wife, four to his father, and two to his mother, which also is one-third of the remainder. And if the portion of each of his heirs, who had shares out of sixteen, be multiplied into the said measure, it will not alter the case; and as each of the sons of the daughter has two shares out of her case, which is six, so if we multiply the same into three, the product will amount to six, which is for him: her daughter had one share out of her case, which multiplied into three produces three, which is for her: her (the deceased's) grandmother also had one out of her case, this (one) multiplied into three amounts to three, Explanation.

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which is for her; and as by reason of her being the mother of the first deceased, she had in hand six out of thirty-two, therefore, there are nine in the hand of the grandmother.—Sharífiyyah, page 97.

Principle.

CXXXI. And if there be a disagreement between them, (that is, between what are in hand from the first and the second arrangements*), then multiply the whole of the second arrangement into the whole of the first arrangement, and the product (will be) the denominator of both cases (*d*).—Sirájiyyah, page 37.

Illustration.

(*d.*) According to the principle laid down in the Chapter on Arrangement with respect to disagreement between persons of one class and their shares. As in the said (4th) example,† when the grandmother, who was the mother of the first deceased, died leaving her husband and two brothers, she had nine in her hand, as you have just learnt, and the arrangement of her case is by four, but there is disagreement between nine and four; consequently, you must multiply four into the former arrangement, that is thirty-two, and the product will be one hundred and twenty-eight, which is the denominator of both cases; for, whoever, had his or her share from thirty-two, that share of his or her will now be multiplied into four, which is the denominator

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cxxxi. And if there be no agreement, but disagreement, between them, then the whole of the second (arrangement) should be multiplied into the whole of the first, and the product will be the root of both cases.—Durr-ul-Mukhtár, page 872.

cxxxi. If the proportion should appear to be prime, the rule is, that the aggregate and individual shares of the distribution must be multiplied by the whole number of the shares into which it is necessary to make the estate at the subsequent distribution; and the individual shares at the subsequent distribution must be multiplied by the number of shares to which the deceased was entitled at the preceding one.—Macn. M. L., Chap. I, Sec. ix, Princ. 98.

* Sharífiyyah, page 97.

† *Ante*, page 246.

of the grandmother's case; and whoever had his or her share from four, that share of his or her will be multiplied into the whole of what was in the grandmother's hand, that is nine.—Sharífiyyah, page 97. LECTURE VII.

After this (process) we say that the wife of the second deceased, that is the wife of the husband of the person first deceased, had two shares out of thirty-two, so if we multiply the same into four, the product, which is eight, will form her portion: his father had four out of the above, which being multiplied into four, the product (=16) will be his portion: his mother had two shares, which multiplied into four will produce eight, which will form her portion. Each of the two sons of the third deceased, who was the daughter of the first deceased, had six out of the above-mentioned number, we multiply the same into four, and the product twenty-four will be the portion of each of those two: her daughter had three out of the above-mentioned number, so when that three is multiplied into four, the product=12 will be her share. And the husband of the fourth deceased, that is of the grandmother aforesaid, had two shares out of four, which was the denominator of her case, we multiply those two into nine, which were in her hand, and the product, amounting to eighteen, forms his portion; and each of her brothers had one out of her case, so we multiply one into nine and get nine, which is for each of those two (brothers).—Sharífiyyah, page 97. Further Illustration.

CXXXII. The allotments of the heirs of the first deceased (out of the arrangement of his case*) *Principle.*

ANNOTATIONS.

cxxxii. Then the shares of the heirs of the first deceased should be multiplied into the multiplicand, that is, into the arrangement of the second case, or into the agreement or measure thereof. And the shares of the heirs of the second deceased (must be multiplied) into the whole of what was in his hand from the first arrangement, or into its measure. And if there be among them one who is heir to two persons, deceased, his share in the first case must be multiplied into the second case or into the measure thereof, and (then) his share in the second case must be multiplied into what was in the hand of the second deceased, or into the measure thereof.—Durr-ul-Mukhtár, page 872.

* Sharífiyyah, page 97.

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must be multiplied into the former multiplicand; that is, into the second arrangement (in case of disagreement*), or into its measure (in case of agreement*), and the product of the multiplication of the share of each of those heirs multiplied into this multiplicand is his or her portion (out of the product aforesaid*). And the allotments of the heirs of the second deceased (out of the arrangement of his case*), must be multiplied into the whole of what was in his hands (in case of disagreement*), or into its measure† (in case of agreement: the product of the multiplication of the share of each of those into what is above mentioned will be his or her share*).

ANNOTATIONS.

cxxxii. If the proportion should be concordant, or composit, the rule is, that the aggregate and individual shares of the preceding distribution must be multiplied by the measure of the number of shares into which it is necessary to make the estate at the subsequent distribution, and the individual shares at the subsequent distribution must be multiplied by the measure of the number of shares to which the deceased was entitled at the preceding distribution.—Macn. M. L., Chap. I, Sec. ix, Princ. 99.

cxxvii—cxxxii. For instance, a man dies leaving A, his wife, B and C, his two sons, D and E, his two daughters; of whom A and D died before the distribution, the former leaving a mother, and the latter a husband.

At the first distribution, the estate should be made into forty-eight shares, of which the widow will get six, the sons fourteen each, and the daughters seven each. On the death of the widow, leaving a mother and the above four children, her estate should, in the first instance, be made into thirty-six parts, of which the mother is entitled to six, the sons to ten each, and the daughters to five each; but being a case of vested inheritance, it becomes requisite to ascertain the proportion between the number of shares to which she was entitled at the preceding distribution, and the number into which it is necessary to make the

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* Sharífiyyah, page 97.

† Sirájiyyah, page 37.

CXXXIII. And if a third, or a fourth, or a fifth die (before distribution*), then put the second product in the place of the first arrangement, and the third (case) in the place of the second, in working out, (as if the first and second deceaseds were one and the same person, deceased, and the third deceased were the second person*), and thus (work

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estate. Thus $6 \times 6 = 36$, which proving concordant, or agreeing in six, the rule is, that the aggregate and individual shares of the preceding distribution be multiplied by six, or the measure of the number of shares into which it is necessary to make the estate at the second distribution. Thus $48 \times 6 = 288$, and $14 \times 6 = 84$, and $7 \times 6 = 42$; but the measure of the number to which the deceased was entitled at the preceding distribution being only one, it is needless to multiply by it the shares at the second distribution. On the death of one of the daughters, leaving her two brothers, her sister, and a husband, her estate should, in the first instance, be made into ten parts, of which her husband is entitled to five, her brothers to two each, and her sister to one; but being a case of vested inheritance, it becomes requisite to ascertain the proportion between the number of shares to which she was entitled at the preceding distribution and the number into which it is necessary to make her estate. But she derived forty-seven shares from the preceding distributions (five at the second, and forty-two at the first). Thus $10 \times 4 = 47-7$, and $7 = 10-3$, and $3 = 7-4$, and $3 = 4-1$, which proving prime or agreeing in a unit only, the rule is, that the aggregate and individual shares of the preceding distributions be multiplied by ten, or the whole number of shares into which it is necessary to make the estate at the third distribution. Thus $288 \times 10 = 2{,}880$, and $84 \times 10 = 840$, and $42 \times 10 = 420$, and $6 \times 10 = 60$, and $10 \times 10 = 100$, and $5 \times 10 = 50$. Then the shares at the third distribution should be multiplied by the number of shares to which the deceased sister was entitled at the preceding distributions. Thus $5 \times 47 = 235$, and $2 \times 47 = 94$, and $1 \times 47 = 47$. Therefore, of the 2,880 shares, the son B will get $840+100+94 = 1{,}034$; the son C $840+100+94 = 1{,}034$; the daughter E $420+50+47 = 517$; the mother of A 60, and the husband of D 235. —Macn. M. L., Chap. I, Sect. ix, Princ. 100.

cxxxiii. And if a third die before distribution, the second product would be put in the place of the first (arrangement), and the third in the

* Sharífiyyah, page 97.

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out) in the cases of a fourth, and a fifth, and so on to infinity.*—Sirájiyyah, page 37.

If the heirs agree among themselves that any of them may take a particular thing out of the assets left by the deceased, the same is proper, provided it (the settlement) be effected upon the mutual agreement (of all the heirs). The principle or rule, according to which the above may be effected and the remaining assets divided among the other heirs, is as follows:—

Principle. Of Subtraction.

CXXXIV. When any one (of the heirs) agrees to take a certain property out of the assets left by the deceased, then subtract (*e*)† his share from the arranging number, and divide the remainder of the

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place of the second in working out, and thus each one deceased would be put in the place of the second, and the product gained before him in the place of the first (case); and so on to infinity. This is the rule for working out.—Durr-ul-Mukhtár, page 872.

CXXXIV. When any one of the heirs or creditors agrees to take a certain property out of the assets left, his share must be subtracted from

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* We need only add, that although the conclusion of the chapter before us be obscured by its extreme conciseness, yet it plainly means, that "when any number of heirs die successively before the distribution, if the shares vested in the last deceased do not quadrate with the arrangement of his own estate, we must consider all those who died before him as *one* deceased heir, and himself as the second, and then work by the proceding rules. To give more examples would be very easy, but the reader would find them insupportably tedious."—Note by Sir William Jones, page 93.

† The practice of subtraction arose from the case of Abd-ur-Rahmán and his four wives, decided in the reign of Othmán (Usmán); and the section concerning it will be made clear by a fuller explanation of the example in the text. We have seen, that the widower is entitled to a moiety, the mother to a third, and the uncle to the residue; so that, if Laela's estate be divided into six parcels, the distribution may be made without a fraction: but if the widower agree to keep the mahr, or nuptial present to his wife, which he had never actually paid, instead of his three-sixths of the whole, the remainder, after deducting the mahr, must be divided into three parts, of which the mother will have two, and the uncle one. So, if the mother agree to take a

assets by the portions of those who remain* (*f*).— *Vide* Sirájiyyah, page 31. LECTURE VII.

(*e.*) This (subtraction) is related by Muhammad in the book of *Sulh* (amicable settlement) from Ibnu Abbás. And there is a tradition from Umar, the son of Dínár, that Abdur-Rahmán, the son of Ayúf, divorced his wife, 'Tamázur,' descended from the race of Kalab, in his last illness of which he subsequently died during the period of the woman's probation. Usmán made her an heir with the other three females (wives). Then these females settled with Explanation.

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the arranging number, and that will operate just as if the same were his adequate share. Then the remainder of the arranging number or of the debt is to be divided according to the portions of the rest of them, and the case is arranged in reference to those;—as if (a woman leave her) husband, mother, and paternal uncle, and the husband compromise by taking the marriage-dower (*mahr*) which was due from him, and is apart from amongst the heirs, then subtract his share, which amounts to three, from the arranging number, and divide what remains after deducting the *mahr* in thirds, between the mother and uncle in proportion to their shares in the arranging number which they had before the subtraction: thus there will be two shares for the mother, and one for the paternal uncle. It is not proper to reckon the husband as non-existent, as in that case, the mother's share, which is one-third of the whole, will be converted into one-third of the remainder, and thus the mother will get one share, and the uncle two shares, contrary to the doctrine unanimously established or accepted.—Durr-ul-Mukhtár, page 879.

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jewel, or other specific thing, in lieu of her two-sixths; or the uncle, a slave or a carriage, in the place of his sixth part; the remainder, which would be four parts in the first case, and five in the second, must go to the other claimants in proportion to their shares. Again, if Amru leave his mother Fátima, two sisters by the same mother, Latifa and Solma, and the son of a paternal uncle, Selim; here also the inheritance must be divided by the rule into six parts: now, if the deceased left a female slave and thirty gold mohrs, and if Solma consented to keep the slave instead of her legal share, or a sixth, the remainder of the property must then be divided into five parcels, six gold mohrs, in each, of which Fátima and Latifa must receive each one parcel, and Selim, the three parcels which remain. It is obvious that, if the first calculation were made in the preceding cases, on a supposition that the taker of the specific thing was dead or incapable of inheriting, there would be either a defect or an excess in some of the allotments to the other claimants.—Note by Sir W. Jones, page 89.

* If one of the heirs choose to surrender his portion of the inheritance for a consideration, still he must be included in the division. Thus, in the

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her to the amount of eighty-three thousand (which is said by some to have been *dirms*, by others, *dinárs*,) for one-fourth of the eighth part (which formed their share).—Sharífiyyah, page 76.

Explanation.

(*f.*) That is to say, arrange the case in the manner as if the person who made the amicable settlement were not excluded, then subtract his share from the arrangement.—Sharífiyyah, page 76.

Illustration.

As (if a woman leave her) husband, mother, and a paternal uncle: now (suppose that) the husband agrees to take for his share, (which is half,) the marriage-dower (*mahr*) which was due from him, this is deducted from among (the assets), and the remainder of the assets is divided between the mother and uncle in thirds, according to their legal shares, and thus there will be two parts for the mother, and one for the uncle.* Because in the case of the husband having been among the heirs, the division was by six, which was divisible among the heirs without leaving a fraction, there being three shares for the husband, two shares for the mother, and the remaining one for the paternal uncle.†

The principles hitherto laid down relate to the shares to which the heirs are entitled. It remains, therefore, to give the rules for the actual distribution of the estate. To give the shares of the different sets of heirs as well as to the individual heirs and creditors, the following are the rules:—

Principle. Of distribution.

CXXXV. When the number of shares has been found into which the estate should be divided, and

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case of there being a husband, a mother, and a paternal uncle, the shares are one-half and one-third. Here, according to Principle 64, the property must be made into six shares, (see *ante*, page 202), of which the husband was entitled to three, the mother to two, and the paternal uncle, as a residuary, to the remaining one. Now, supposing the estate left to amount to six lacs of rupees, and the husband to content himself with two, still, as far as affects the mother, the division must be made as if he had been a party, and of the remaining four lacs the mother must get two; otherwise, were he not made a party, the mother would get only one-third of the four, instead of one-third of six, lacs as her legal share, and the remainder would go to the uncle as residuary.—Macn. M. L., Sect. vi, Princ. 87.

* Sirájiyyah, page 31.

† Sharífiyyah, page 76.

the number of shares to which each set of heirs is entitled, the former must be compared with the number of the assets. LECTURE VII.

CXXXVI. If there be equality between the property left and the (number arising from the) arrangement, the case is clear.* But,— *Principle.*

CXXXVII. If there be no equality (but disagreement) between them, then multiply the portion of each heir according to that arrangement into the aggregate of the property, and divide the product by the number of the arrangement (*g*)†; and the quotient of this division is the share of that heir.* *Principle.*

(*g*.) For instance, if a woman leave her husband, mother, and two sisters by the same father and mother, the division will be by six, which will be increased or raised to eight, of which, there should be allotted three to the hus- *Illustration.*

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cxxxvi, cxxxvii. If you wish to divide the property left by the deceased among (his) heirs and creditors, that is for each of them separately, and not for all of them collectively, then, if there be equality between the property left and the (number arising from the) arrangement, the case is clear, but if there be an agreement (tawáfuk), multiply the share of each heir according to that arrangement into the aggregate of the property as is directed in the text of this book and the commentary (thereon.) According to the Sirájiyyah and other books, however, the above should be multiplied into the measure (wakf) of the property, there being no multiplication into the aggregate of the property, unless the case be one of disagreement.—Durr-ul-Mukhtár, page 878.

And you will, in like manner, work out the problem to know the portion of each of the classes.—*Ibid.*

cxxxvii. If it be desired to ascertain the number of the shares of the assets to which each individual heir is entitled, the same process must be resorted to, with this difference, that the number of the assets must be compared with the share originally allotted to each individual heir,

* Sharífiyyah, page 72.
† Sirájiyyah, page 30.

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band, one to the mother, and two to each of the sisters. If we take the whole of the property to amount to twenty-five dínárs, there will be a disagreement between them and the (number arising from the) arrangement, which is eight. If you, however, wish to know the share of each heir in the property left, multiply the husband's portion, which is three according to that arrangement, into the aggregate of the property, and the product will be seventy-five; then divide this product by the number of the arrangement, that is eight, and the quotient will be nine dínárs and three-eighths of a dínár, which is the portion of the husband out of the said property; multiply also the mother's share, which is one according to that arrangement, into the aggregate of the property, and the product will amount to twenty-five, then divide this by eight, and the quotient, amounting to three dínárs and one-eighth of a dínár, will be the portion of the mother out of the deceased's property: multiply likewise each sister's share, which is two, into the aggre-

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and the multiplication and division proceeded on as above.—Macn. M. L., Chap. I, Sect. xi, Princ. 110.

If these numbers appear to be prime to each other, the rule is, that the share of each set of heirs must be multiplied into the number of the assets, and the result divided by the number of the shares into which it was found necessary to make the estate.* If the numbers are composit, the rule is, that the share of each set of heirs must be multiplied into the measure of the number of the assets, and the result divided by the measure of the number of shares into which it was found necessary to make the estate.†—Macn. M. L., Chap. I, Sect. xi, Princ. 108.

* For instance, a man dies leaving a widow, two daughters, and a paternal uncle, and property to the amount of 25 rupees. In this case, the estate should be originally divided into 24, of which the widow is entitled to 3, the daughters to 16, and the uncle to 5. Now to ascertain to what shares of the estate left, these heirs are entitled, the above rule must be observed. Thus, $3 \times 25 = 75$, and $16 \times 25 = 400$, and $5 \times 25 = 125$; but $75 \div 24 = 3\frac{3}{24}$, and $400 \div 24 = 16\frac{16}{24}$, and $125 \div 24 = 5\frac{5}{24}$.—Macn. M. L., Chap. I, Sect. xi, Princ. 108.

† For instance, a man dies, leaving the same number of heirs as above, and property to the amount of 50 rupees. Now, as 24 and 50 agree in 2, the measure of both numbers is half. Thus $3 \times 25 = 75$, and $16 \times 25 = 400$, and $5 \times 25 = 125$, but $75 \div 12 = 6\frac{3}{12}$, and $400 \div 12 = 33\frac{4}{12}$, and $125 \div 12 = 10\frac{5}{12}$.—*Ibid.*, Princ. 109.

gate of the property, and the product will amount to fifty, then divide this product by eight, and the quotient, six dínárs and one-fourth of a dínár, will be each sister's share in the property left by the deceased.—Sharífiyyah, page 72. LECTURE VII.

CXXXVIII. But if there is an agreement between the arrangement and the property left, then multiply the portion of each heir according to the arrangement into the measure of the property, and divide the product by the measure of the number (arising from the arrangement*): the quotient will be the portion of that heir in both methods (*h*).—Sirájiyyah, page 30. *Principle.*

(*h*.) As, in the above case or example, if the property left by the deceased amount to fifty dínárs (instead of twenty-five), or there be concordance between them, as in the above example, and the property amount to twenty-four dínárs, then, in both these cases, the portion of each heir according to that arrangement, which is prime, must be multiplied into the aggregate of the property, and the product divided by the number of the arrangement, as is done in the case of disagreement, and thereby the share of this heir in the property, which is the subject of distribution, will be separated. Let this, however, be known to you, that when there is no fraction in the property of the deceased, then the rule above laid down will apply; but when there is a fraction therein, then it will be necessary to increase or expand the property, in order that it be of one and the same kind, and the mode of expanding is, that the integral number of the property left be multiplied into the denominator of the fraction, then the fraction be added to the product, and after that, the number of the arrangement also be multiplied into the denominator of the fraction of the property, then the two products be worked out by multiplication and division, and the quotient will be the portion of each heir. Thus, if, in the above-mentioned case, it be supposed that the property left amounted to twenty-five dínárs, and one-third of a dínár, then we must multiply twenty-five into the denominator of one-third, which is three, and *Explanation.*

* Sharífiyyah, page 72.

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the product gained will be seventy-five, to which being added the one-third (aforesaid), the aggregate amounts to seventy-six: then, if we multiply also (the number) eight, by which the case is arranged, into three, the product will be twenty-four; next, if we multiply the portion which each heir had, out of eight, into seventy-six, and divide the same by twenty-four, the quotient will be the portion of that heir, as if the property had (originally) amounted to the integral number seventy-six (dínárs), and the root of the case, to twenty-four.—Sharífiyyah, page 73.

Principle. CXXXIX. Next, in order to know the portion of each set, you must multiply what each set has according to the root of the case, into the measure of the property left, then divide the product by the measure (of the arrangement*) of the case, if there be an agreement between the property left and (the arrangement of*) the case (*i*); but, if there be a disagreement between them, then you must multiply (what was the portion of each set*) into the whole of the property left, and divide the product by the whole number (arising from the arrangement*) of the case; and the quotient will be the portion of that set in both methods [that is agreement and disagreement* (*j*.)]—Sirájiyyah, page 30.

(*i*.) The exemplification and illustration of the case of agreement (are as follow):—

Exa ple. A husband, four sisters of the whole blood, and two sisters by the same mother only (being left by a woman, her surviving,) originally the division was by six, which is the root of the case, and which is (here) increased to nine.† Now if we suppose the property left to amount to thirty (dínárs or the like), there is between the (number of the) property and (that of the) arrangement an agreement in three; so if we multiply the husband's portion, which is three, from the root of the case, into the measure of the pro-

* Sharífiyyah, page 74.

† See *ante*, pages 228—230.

perty, which is ten, the product will be thirty, and if we divide this product by one-third of the root of the case, which also is three, the quotient is ten, which is the portion of the husband, and if we multiply the whole sister's portion, which is four, into one-third of the property, the product will amount to forty; and then if we divide the same by one-third of the root of the case, the quotient will be thirteen (and one-third) which is the share of those sisters; next, if we multiply the share of the two sisters by the same mother only, which is two, into one-third of the property, the product will amount to twenty; then if we divide the same by one-third of the root of the case, the quotient will be six and two-thirds, which is the portion of those two sisters.—Sharífiyyah, page 74. LECTURE VII.

The case of *tadákhul* (concordance) is like that of *tawáfuk* (agreement).

(*j.*) The example of the case of disagreement *(tabáyun)* is, that in the above-mentioned case (of agreement) if you suppose the property to be thirty-two (dínárs), then there would be a disagreement between this and (the number of) the arrangement, which is nine; consequently, we must multiply the husband's share, which is three, into the whole of the property, and the product will be ninety-six; then we must divide this number by the whole of the root of the case, which is nine, and the quotient, which is ten and two-thirds, will be the portion of the husband out of the property in question; we must also multiply the share of the sisters of the whole blood, which amounts to four, into the whole of the property, and the product will be one hundred and twenty-eight, and then divide this product by nine, the quotient, amounting to twenty-four and two-ninths, will be the portion of the sisters by both parents from the property aforesaid; we must likewise multiply the share of the two sisters by the same mother only into the whole of the property, and the product will be sixty-four, then divide this product by nine, and the quotient, amounting to seven and one-ninth, will be the portion of those two (sisters) from the supposed amount of the property left.—Sharífiyyah, page 74. Further example.

CXL. As to the payment of debts, the debt to each of the creditors stands in the place of the portion of each heir (in the process of working *Principle* Of dividends.

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out,*) and the debts to all the creditors stand in the place of the arranging number (*l*).†—See Sirájiyyah, *Arabic*, page 31.

Explanation.

(*l.*) If the deceased's property, remaining after (defrayment of the expenses of) the funeral ceremony and burial, be sufficient for (the liquidation of) the debts, there is no difficulty, as (in that case) every one of the creditors will have his due in full; but if it be not sufficient for (satisfying) the number of the creditors, then the mode of knowing

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cxl. As to the payment of debts, if (the property be) sufficient, it is well, if it be not sufficient, and there be a number of creditors, then the whole of the debts is (to be taken) as the arranging number, and the debt owing to each creditor is to stand as the share of each heir; and you must work out as already mentioned.—Durr-ul-Mukhtár, page 778.

In a distribution of assets among creditors, the rule is, that the aggregate sum of their debts must be the number into which it is necessary to make the estate, and the sum of each creditor's claim must be considered as his share. For instance, supposing the debt of one creditor to amount to 16 rupees, of another to 5, and of another to 3, and the debtor to have left property to the amount of 21 rupees. By observing the same process as that laid down in principle (109), it will be found that the creditor to whom the debt of 16 rupees was due, is entitled to 14 rupees, the creditor of 5 rupees, to 4 rupees 6 annas, and the creditor of 3 rupees, to 2 rupees 10 annas.—Macn. M. L., Chap. I, Sect. xi, Princ. 111.

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* Sharifiyyah, page 74.

† It seems needless to give examples of the simple rules for ascertaining the dividends of each class; but the passage concerning creditors, at the close of the chapter, is made obscure by extreme brevity, and requires a short illustration. Suppose the assets of Amru to be *nine* pieces of gold; his debts, *five* pieces to Saad, and *ten* to Ahmed; here the aggregate of the debts, fifteen, is composit to nine, and their measures are five and three; so that, by the rule before mentioned of distribution among heirs, Ahmed will receive six, and Saad, three pieces; but, had the debtor left thirteen, which would have been prime to the amount of both debts, then fifteen, standing in the place of the verification, as they call it, must be the divisor of the several products, arising from the multiplication of ten and five into thirteen, and the quotient $8\frac{1}{3}$ and $4\frac{1}{3}$ will be the respective dividends of Ahmed and Saad.—Note by Sir W. Jones, page 88.

(finding out) the portion of each creditor from the property, which fell short, is, that the debt (due) to each of them is put in the place of each heir's share in the arranging number, and the whole of the debts is put in the place of the whole arranging number, and worked out in the same manner as for the determination of the share of each heir which is already done.—Sharífiyyah, page 75. LECTURE VII.

Thus, if a person die leaving nine dínárs, and there are due from him ten dínárs to one (creditor), and five dínárs to another, these dínárs added together amount to fifteen, which are in the place of the arranging number, and between fifteen and nine there is agreement in three; so if we multiply the debt of the person to whom ten dínárs are due from the (estate of the) deceased, into one-third of nine, the product is thirty, and then if we divide this product by the measure of the arrangement, which is five, the quotient amounting to six is the portion of the person to whom ten dínárs are due; and if we multiply the debt owing to the person who has to receive five dínárs from him (the deceased) into the measure of the property left, which is three, the product will be fifteen, and then if we divide this product by one-third of (the number of) the arrangement, the quotient amounting to three is the portion of the person to whom five dínárs are due.—Sharífiyyah, page 75. Illustration.

And in the above-mentioned case, if we suppose the property to amount to thirteen (dínárs), then there is disagreement between the property and the arranging number, in which case the debt due to the owner (creditor) of ten (dínárs) should be multiplied into the whole of the property, and the product will be one hundred and thirty; then if we divide this product by the whole of the arranging number, which is fifteen, the quotient will be eight and two-thirds, which is the portion of the person to whom ten (dínárs) are due; and if the debt of the person to whom five (dínárs) are due be likewise multiplied into the whole of the property left, the product will be sixty-five; then if we divide this product by fifteen, the quotient will be four and one-third, which is the portion of him to whom five (dínárs) are due. And if, in the above case, we suppose the property to be five dínárs, then there is an agreement in five between the property and the arranging number on Further illustration.

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account of their being mutadákhil as already mentioned,* so we must multiply the debt of the person to whom ten (dínárs) are due into one-fifth of the property left, which is one, and divide the product, which is ten, by one-fifth of the arranging number, which is three, and the quotient amounting to three and one-third is the proportion of the person to whom ten dínárs are due; if we likewise multiply the debt of the person to whom five (dínárs) are due into the measure of the property left, and divide the product by the measure of the arranging number, which is three, the quotient amounting to one and two-thirds is the portion of the person to whom five (dínárs) are due. And you have already known that the mode (rule) prevalent in the case of disagreement comprises also the case of tawáfuk and tadákhul.—Sharífiyyah, page 75.

Principle Of partition.

CXLII. It is lawful for several partners to agree amongst themselves to make a division of their joint property. But if there be an infant among them, it is requisite that they procure an order from the Magistrate (Kází); for they possess no power over the infant.—Hidáyah, vol. iv, page 4.

Principle.

CXLIII. If the joint owners and possessors of a property request the partition of it, the Kází (Judge), may, upon their proving it to be so, order the partition.†

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cxliii. It is mentioned in the Jámi-us-Saghír‡ that when two men apply for partition of lands which they prove by witnesses to be in their possession, the Kází must not order the partition until they also prove, by evidence, that the lands are their property; for otherwise it is possible they may belong to another person.—Hidáyah, vol. iv, page 8.

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* That is the smaller number exactly measuring the larger.—See *ante*, page 205.

† See Hidáyah, vol. iv, page 8.

‡ *Vide* Introductory Lecture, page 38.

CXLIV. Partition may be granted at the requisition of even a single co-sharer, where the respective share of each of the partners is capable of being separately converted to use, because partition is an indisputable right, when required in any article capable of partition.—*Vide* Hidáyah, vol. iv, page 11. *Principle.*

Nevertheless,—

CXLV. If only one heir appear, a partition must not be ordered, although he produce the necessary evidence, for it is requisite that both the litigants be present, and one man cannot appear on both sides.—*Ibid*, page 10. *Principle.*

CXLVI. If, on the contrary, the share of one partner only be fit for use, and not that of the other, because of its being extremely small, and the owner of the greater share demand a partition, the Kází must grant it, but he must not grant it at the requisition of the other partner; for as the former can reap a benefit from his share, his demand is worthy of regard, but as the latter can have no other motives for his requisition than malice, and a desire of giving trouble, it is not to be attended to.—Hidáyah, vol. iv, page 11. *Principle.*

CXLVII. If the shares of each of the partners be so very small that they would separately be of no use, the Kází must not order a partition, unless all the partners acquiesce; for, whenever partition is compulsively made, it is with a view to promote utility.—*Ibid*, page 11. *Principle.*

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cxliv. Where two persons claim partition of an estate which has devolved on them by inheritance, it should be granted, so also where one heir claims it, provided the property admit of separation without detriment to its utility.—Macn. M. L., Chap. I, Sect. xii, Prin. 112.

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Principle. CXLVIII. A partition must not be granted where the property consists of various species or of household vessels, unless all parties consent thereto. Partition cannot also be made of a bath, mill, or well without the consent of all the parties.—*Vide* Hidáyah, vol. iv, pages 12 & 13.

Principle. CXLIX. Where two heirs appear, and produce evidence to prove the death of their ancestor, and the number of his heirs, and the house or other heritage is in their possession, but one of the heirs is absent,—in this case, the Kází may order a partition, if the heirs who attend require it, appointing an agent to take possession of the portion of the absentee; or if, under the same circumstances, one of the heirs be an infant, the Kází may order a partition, appointing a guardian to take possession of its portion; because in so doing, the interest of the infant or absentee is promoted.—*Ibid,* pages 8 & 9.

Principle. CL. If the land, or a part of it, be in the possession of an absent heir, or of his trustee, or in that of an infant heir, the partition must not be ordered, whether the heirs who are present produce evidence or not.—*Ibid,* page 10.

This is approved; for the partition, in such a case, would, in fact, be a decree against an absentee, or an infant, divesting him of something he possesses without any litigant appearing on his behalf; nor can the trustee of the absentee stand as litigant on his behalf in any thing which may be attended with loss to him; and it is illegal in the Kází to pass a decree without all the litigants being present.—*Ibid,* page 10.

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cxlviii. But where the property cannot be separated without detriment to its several parts, the consent of all the co-heirs is requisite; so also where the estate consists of articles of different species.—Macn. M. L., Chap. I, Sect. xii, Princ. 113.

CLI. The partitioner must divide the article in due proportions, separate each share and measure it, so that its extent may be known. He must, moreover, appraise the article, as it is requisite, for his further guidance, that the value be ascertained.—*Vide Ibid*, pages 16 & 17. LECTURE VII. *Principle.*

CLII. Supposing the article to be a house, in separating the shares he must also separate the road and the drain belonging to it, if possible, so that one share may no longer have any connection with the other, in order that every cause of dispute may be terminated, and that the intention of the partition may be completely accomplished.—*Vide* Hidáyah, pages 16 & 17. *Principle.*

CLIII. The article must, moreover, be divided into fractions equal to the smallest proportion, that is to say, if the smallest portion held by any of the partners or co-parceners be a third, the whole must be divided into three parts; or if the smallest portion be a sixth, the whole must be divided into six parts; so that the division may be made accurately. Thus, if an estate is to be divided betwixt two heirs, the one being a son, and the other a daughter, it must be divided into three shares, one termed the first, the next to it, the second, and the next, the third; and the partitioner is to write the names upon the billets, and cause them to be drawn like lots; and if the son's name come up first, he gets the first share, and the one next to it, and the third goes to the daughter; or if the daughter's name come up *Principle.*

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cliii. On the occasion of a partition, the property (where it does not consist of money), should be distributed into several distinct shares, corresponding with the portions of the co-heirs; each share should be appraised, and recourse should be had to the drawing of lots.—Macn. M. L., Chap. I, Sect. xii, Princ. 114.

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first, she gets the first share, and the other two fall to the son.—Hidáyah, vol. iv, page 17.

Principle. CLIV. The partitioner in making the divisions of landed property, must not annex a consideration in *dirms* or *dínárs* (money), without the concurrence of the parties (*c*).—*Ibid*, page 17.

(*c.*) That is to say, if he make one share less than the other, and as a compensation annex to it a sum in *dirms* (money), it is not valid unless they consent, for partnership is not in *dirms*, and partition is one of the rights of partnership. Besides, if *dirms* be admitted into the transaction, it destroys the equality of the portion; because one of the partners gets the property, and is liable for the *dirms* which have become the right of the other; and there is possibility that he may never pay them, by which means the other would lose his right.—*Ibid*, pages 17 & 18.

Principle. CLV. Another common method of partition is by usufruct (Mahâyat*), in which each heir enjoys the use, or the profits, of the property by rōtation.† The same is as follows:—

Principle. CLVI. If a partition be made regarding the produce of a house to this effect, that the one partner

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* Mahâyat, in the language of the law, signifies the partition of the usufruct, and it is allowed; because it is frequently impossible for all the partners to enjoy together, and at one and the same time, the use of the thing held in partnership. Mahâyat, therefore, resembles the partition of property, with this difference, however, that in the partition of property each sharer enjoys the use of his respective share at the same time, whereas in the partition of usufruct each most frequently enjoys the use of the thing held in partnership only when it comes to his turn by rotation. Partition of property is, therefore, more effectual than partition of usufruct in accomplishing the enjoyment of the use; for which reason, if one partner apply for a partition of property, and another for a partition of usufruct, the Kází must grant the request of the former; and if a partition of usufruct should have taken place, with respect to a thing capable of a partition of property (such as a house or a piece of ground), and afterwards one of the partners apply for a partition of property, the Kází must grant partition of property and annul the partition of usufruct.—Hidáyah, vol. iv, page 31.

† But this method is subordinate to actual partition; and where one co-heir demands separation, and the other, a division of the usufruct only, the former claim is entitled to preference in all practicable cases.—Macn. M. L., Chap. I, Sect. xii, Princ. 115.

shall let it out for one or two months, and enjoy the produce or rent, and that afterwards the other partner shall let it out in the same manner, and enjoy the rent, such a partition is valid, according to Záhir-ur-Rawáyit; but a similar agreement regarding a slave or a quadruped is not valid.—Hidáyah, vol. iv, page 36.

CLVII. If it should happen that the rent of a house is greater during the turn of one partner, than in that of the other, they are both to participate in the excess, or difference betwixt the one rent and the other, so that an exact equality may be effected betwixt them. It is otherwise where they make a partition respecting the use of the house, and it afterwards yields a greater produce to the one in his turn than to the other.—*Ibid*, page 36. *Principle.*

CLVIII. If two partners, by a mutual contract, make a partition of usufruct respecting a house, to this effect, that one of them shall inhabit one part of it, and the other another,—or that one shall inhabit the upper floor, and the other, the lower, such contract is valid; for as a partition of property executed in this manner is lawful, so likewise is a partition of usufruct.*—*Ibid*, page 32. *Principle.*

CLIX. If two persons make a partition of usufruct regarding two houses; in this manner, that the *Principle.*

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* It is proper to remark, that a partition of usufruct, when thus executed, is in reality a separation, that is a division of the whole of the shares of usufruct of one partner from those of another partner.—Hidáyah, vol. iv, page 32.

It is lawful for each partner to let out on rent that part of which the usufruct has fallen to him, and he may appropriate to himself the rent accruing therefrom, whether it be a condition in the agreement of partition of usufruct or not; for every use which accrues from that part becomes (in consequence of the partition of usufruct) his property, and the rent which he receives is nothing more than a compensation given him in lieu of the use accruing from it.—*Ibid*, page 32.

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one shall inhabit the one house, and the other shall inhabit the other, it is valid; and the Kází may enforce it, according to the two disciples; and such is also the opinion of Hanífah, as mentioned in the Záhir-ur-Rawáyit.—Hidáyah, vol. iv, page 34.

Principle.

CLX. A partition concerning the rent of two houses is likewise lawful, according to the Záhir-ur-Rawáyit, for the same reasons as have been assigned in the case of one house. If, however, one house yield a greater rent than the other, still the partners do not both share in the excess.—Hidáyah, vol. iv, page 36.

The reason of this distinction is that, in the case of two houses, when a partition of their rents is made, separation is the prevailing principle.—*Ibid*, page 36.

If two partners make a partition of usufruct regarding an orchard of dates, or a garden containing trees, in this manner, that each shall take a part and cultivate it, and enjoy the fruits produced from it,—or if they make a partition of usufruct regarding a herd of goats, in this manner, that each shall take a certain number, and feed them, and enjoy the milk produced by them, neither of these partitions of usufruct is valid. Because partition of usufruct regarding use, as well as partition of usufruct regarding service, is admitted only from necessity, as being unsubstantial, and, therefore, incapable of division; but, in the present instances, the fruit and milk, when once produced, are capable of division, being things which substantially exist, and, therefore, there is, in these instances, no necessity.—Hidáyah, vol. iv, page 38.

LECTURE VIII.

ON APOSTACY—IMPEDIMENTS TO SUCCESSION, AND—EXCLUSION FROM INHERITANCE.

THE lexicographical meaning of the '*Murtadd*' (rendered by 'apostate') is one who turns away (from an object); but in law it signifies 'a renouncer of the Muhammadan faith.' The essentiality of apostacy consists in the uttering of words against the (Muhammadan) religion, after embracing the (Muhammadan) faith, which is belief in Muhammad with respect to all that came down to him from Almighty God.—Durr-ul-Mukhtár, page 392. Apostate defined.

CLXI. When a male apostate has died (naturally), or been killed, or passed into a hostile country *Principle* Of apostacy.

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clxi. When a male apostate is put to death, or dies naturally, or escapes to a foreign country, all that he had acquired while a Musalmán belongs to his heirs.*—Fatáwá Alamgírí, vol. vi, page 633.—*Vide* B. Dig., page 700.

If he (the apostate) die, or be killed while an apostate, or be determined (by the Kází) to have gone into a hostile country, then his Musalmán heir, even though such heir be a wife, who has observed the abstinence (*iddat*), will inherit what was acquired by him (the apostate) at the time of his having been a Musalmán, after payment, however, of the debts incurred by him while a Musalmán; but what was acquired by him during apostacy, will be (taken as) a spoil, after payment of the debts which he had contracted while an apostate. The two lawyers, (Abú Yusuf and Muhammad,) say, that the property acquired during apostacy is also an inheritance.—Durr-ul-Mukhtár, page 392.

* By Act XXI of 1850 of the Indian Legislature, it is declared, that—"so much of any law or usage as inflicts on any person forfeiture of right or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the

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(dár-ul-harb), and the Judge (Kází) has determined his having gone into the hostile country, then what he had acquired at the time of his being a Musalmán goes to his heirs who are Musalmáns (*a*), but what he has earned since the time of his apostacy, is placed in the Public Treasury (Bayit-ul-mál), according to Abú Hanífah.—Sirájiyyah, page 58.

But according to the two lawyers (Abú Yusuf and Muhammad) both the acquisitions go to his Musalmán heir or heirs.—*Ibid*, page 58.

Explanation.

(*a*.) Among these the wife is included, if she is a Musalmán, and her *iddat* is unexpired at the time of his death. But if her *iddat* has expired, or if her marriage was never consummated, she has no right to any share in his inheritance. She also loses her right if she apostatizes with him; though when a husband and wife apostatize together, her marriage still continues. If she should bear a child after their apostacy, and the husband should then die, the child would be entitled to a share in his inheritance, if the birth takes place within six months from the day of the husband's apostacy; but if the birth should take place at more than six months from the day of the apostacy, the child would have no right.—Fatáwá Alamgírí, vol. vi, page 633.—B. Dig., page 700.

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communion of any religion, or being deprived of caste, shall cease to be enforced as law in all the courts of this country." This removes the disqualifications of the apostate himself; but his children, if brought up in his new faith, would be still excluded from the inheritance of their Musalmán relatives by the mere difference of religion—an objection that is left untouched by the Act; while apparently, there would be no objection to the relatives inheriting from the apostate or his children, for being no longer of the Musalmán religion, his or their succession could hardly be regulated by Muhammadan Law.—Note by Mr. Neil Baillie.

In Syed Ziya-ood-deen *v.* Sheikh Lootf Alee, it has been actually determined by the late Sudder Dewanny Adawlut, that 'if by Muhammadan Law a Sunní could not inherit from a Shiáh, (a Sunní's becoming a Shiáh and *vice-versâ* being according to that law *quasi* apostacy), then under the provisions of Act XXI of 1850 (the clear purport whereof is, that religious exclusion shall not be permitted to check the ordinary current of the civil law of inheritance, and any law previously in force, which should be taken to interrupt the law of inheritance upon the ground of a change of religious faith, shall not at all be enforced) this rule of Muhammadan Law cannot be enforced, so as to impair the right of inheritance.—Sudder Dewanny Adawlut, Dec. for 1856, page 1092.

According to Sháfií, however, both the acquisitions must be entirely placed in the public treasury. — Sirájiyyah, page 58.

Principle.

CLXII. If, however, he again become a Musalmán previously to the (Kází's) determination, then he will be treated as if he did not become an apostate; and if he returned to the Muhammadan faith after that (determination), when his property has been already with his heirs, then he will retake it either amicably or by law-suit; but he shall not take the property if it has been placed in the public treasury, by reason of its having (already) become a spoil. And if the property has been destroyed, or the heir (or successor) has alienated it relinquishing his own right, then he (the former) shall not have it, even though the property be in existence, because the judgment (of the Kází) is irrevocable.—Durr-ul-Mukhtár, page 392.

The same author moreover says:—"An apostate's right to his estate is forfeited by way of suspense: afterwards, if he return to the Muhammadan faith, the estate will revert to him."—*Ibid.*

Principle.

CLXIII. What he gained after his arrival in the hostile country, is confiscated by general consent;* because it was gained by him while he was a resident in a hostile country, and a Musalmán does not inherit from a resident of a hostile country.†

Principle.

CLXIV. All the property of a female apostate (whether it be acquired by her while she was a Musalmán, or during her apostacy, but previous to

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clxiv. When a female apostate dies, the right of her husband to take a share in her inheritance depends on the fact of her having apostatized

* Sirájiyyah, page 58.

† Sharífiyyah, page 148.

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her going to a hostile country*) goes to her Musalmán heirs, without diversity of opinion.—Sirájiyyah, page 58.

"Because," says Sharíf, "according to our doctrine, a female apostate is never killed, but is imprisoned until she becomes a Musalmán, or departs this life."—Sharífiyyah, page 148.

As regards the succession of apostates themselves,—

Principle. CLXV. A male apostate does not inherit from any one—neither from a Musalmán, nor from an apostate like himself (*c*);—so also a female apostate shall not inherit from any one, except when the people of a whole district become apostates altogether; for then they inherit reciprocally (*d*).—Sirájiyyah, page 58.

(*c.*) Inasmuch as an apostate has, by his apostacy, become a sinner, and, therefore, he is not entitled to any favor of the law, that is to inheritance; on the contrary, he deserves to be excluded with punishment, just as a murderer forfeits his right.—Sharífiyyah, page 148.

(*d.*) Because (then) their district becomes a hostile country by reason of the rules of infidels being promulgated therein.—Sharífiyyah, page 149.

Principle. CLXVI. If a person before his becoming an apostate was entitled to the inheritance of a relative, his subsequent apostacy does not deprive him of his

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ANNOTATIONS.

during health, or during sickness. If the apostacy took place when she was in health, he has no right to anything. If it took place when she was sick, and she has died when her *iddat* was still unexpired, though by analogy she was no evader, and he could, therefore, have no right to her inheritance, yet on a liberal construction she is accounted to be such, and he is allowed to participate.—Fatáwá Alamgírí, vol. vi, page 633.—B. Dig., page 701.

clxv. A female apostate, like a male apostate, cannot inherit from any one, because she has no religion.—*Ibid.*

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* Sharífiyyah, page 58

right of succession to the same; though upon his becoming an apostate he would forfeit his right to hold the property so inherited, and the same would be taken by *his* Musalmán heir or heirs. LECTURE VIII.

Vide Wujih-un-nessá Khánam *v.* Mirzá Hosain Álí.— Sel. Sudder Dewanny Adawlut Reports, vol. i, page 268, (New. Ed., p. 356). Precedent.

Impediments to succession are (principally) four (viz.,) 1—Slavery, 2—Homicide, 3—Difference of religion, and 4—Difference of country. Impediments to succession.

CLXVII. Slavery, whether it be perfect (*e*) or imperfect (*f*), is an impediment to succession.* Principle Of Slavery.

(*e.*) Perfect.] As the condition of an absolute slave (*kinn*), since an absolute slave is not master of any property, though he may have all the means of possessing property: he, therefore, is not entitled to inheritance.—*Vide* Sharífiyyah, page 11.

Two daughters succeed, excluding their mother, who is a slave of the deceased proprietor.—Macnaghten's Precedents of Muhammadan Law, Chap. I, Case lxxii. Precedent.

(*f.*) Imperfect.] As the condition of a Mukátab,† Mudabbar,‡ or Umm-ul-walad.§—Sharífiyyah, page 11. Explanation.

ANNOTATIONS.

clxvii. Slavery is an impediment to inheritance, and in this respect there is no difference between an absolute and a qualified slave. Even a partially emancipated slave is not capable of inheriting according to Abú Hanífah.—Fatáwá Alamgírí, vol. vi, page 631.—B. Dig., page 697.

Slavery, though imperfect, as (the condition of) a Mukátab† slave, (is an impediment to succession).—Durr-ul-Mukhtár, page 862.

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* *Vide* Sirájiyyah, page 5.

† The slave who ransoms himself is denominated a Mukátab (written off).

‡ A Mudabbar slave is he who is promised by his master to be free after his death.

§ An Umm-ul-walad (child's mother) is a female slave who has borne a child or children to her master, and is thence entitled to be free after his death.—See Hidáyah, vol. i, pages 475, 479, and vol. ii, page 98.

Slavery by the Muhammadan Law is either perfect and absolute, as, when the slave and all that he can possess are wholly at the disposal of his master;

LECTURE VIII.

Principle Of homicide.

CLXVIII. Homicide, whether punishable by retaliation (*g*), or expiable (*h*), is an impediment to the slayer's inheriting from the person slain by him.*

Explanation.

(*g*.) 'Homicide punishable by retaliation' is wilful murder. When a person intentionally strikes a blow on a person with a weapon, or with a thing which equally with it may serve to sever a limb or limbs (from one's body,) such as a sharp piece of wood or a stone, its result is crime and retaliation, and there is no expiation for the same.—Sharífiyyah, page 11.

* Every act of malice that induces retaliation or expiation is a cause for depriving (the slayer) of a right of inheritance to the person slain.—Fatáwá Alamgírí, vol. vi, page 631.—B. Dig., page 697.

Explanation.

(*h*.) 'Homicide expiable' is manslaughter, as striking a person with a thing which generally does not kill; and the result thereof, according to both doctrines,† is the payment of expiatory mulct by the relations (of the criminal), and also sin and atonement, there being no retaliation for it;—or it is an accidental death.—Sharífiyyah, page 12.

Example.

As where a man shot an arrow at his prey, and the arrow by accident killed a human being; or where a person, while asleep, turned upon another, and (thereby) killed him; or where a beast of burthen trampled upon (a person) while a man was riding upon it; or where one fell from the roof of a house upon a person (who was thereby killed); or where a piece of stone fell from one's head upon a per-

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or imperfect and privileged, as when the master has promised the slave his freedom on his paying a certain sum of money by easy instalments, or, without any payment, after the death of the master: a female slave, who has borne a child to her master, is also privileged; but in both sorts of slavery, as long as it continues, the slave can acquire no property, and consequently cannot inherit. The Arabian custom of allowing a slave to cultivate a piece of land, or set up a trade on his own account, so that he may work out his manumission by prudence and industry, and by degrees pay the price of his freedom, may suggest an excellent mode of enfranchising the black slaves in our plantations, with great advantage to our country and without loss to their proprietors.—Note by Sir W. Jones, page 60.

* *Vide*, Sirájiyyah, page 5.

† That is, according to the opinions of both Abú Hanífah and Sháfií.

son and he (the latter) died. The result of these is atonement, and payment of expiatory mulct, but no sin: in all of these (or such) cases, the killer would be excluded from the inheritance (of the killed), provided such killing be not a justifiable homicide.—Sharífiyyah, page 12. LECTURE VIII.

CLXIX. There is (however) one instance of intentional homicide, where the crime induces the incapacity of inheriting, though the offender is not subject to retaliation. This is the case of a son murdered by his father. But it is properly an exception to the law of retaliation, the crime having been originally subject to this highest penalty, and remitted by the Prophet.* *Principle.*

"Should you, however, allege," says Sharíf, "that if a father intentionally kills his son, and although no retaliation or atonement is ordained (for it), yet, according to all doctrines, he is excluded (from inheritance)." "To this," says Sharíf, "I would reply, that the killing in question was originally the cause of retaliation, but it has been remitted by (this) dictum of the Prophet: 'A father shall not suffer capital punishment for (killing) his son; nor a master for his slave.' It should not be objected that, according to the (general) dictum of the Prophet, 'a slayer is excluded from the inheritance of the slain,' the slayers should, without exception, be excluded from inheritance, as is held by Sháfií. For, how then can all those cases be excepted?

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clxix. Homicide, whether it is punishable by retaliation, or expiable, (disables the perpetrator to inherit from the slain), even though the crime be pardonable, as in the instance of a father killing his son.—Durr-ul-Mukhtár, page 862.

One who has unlawfully killed another is incapable of inheriting from him, whether the killing was intentional or a misadventure, as by rolling over him in sleep, or by falling on him from the roof of a house, or by treading on him with a beast on which the slayer was riding.—Fatáwá Alamgírí, vol. vi, page 631.—B. Dig., page 697.

* B. M. L., page 24.

LECTURE VIII.

We maintain that the slayer for a just cause is excepted, because exclusion is ordained as a punishment for the prohibited description of killing: but as to the exclusion of the creator of a cause of killing, he is not in fact a killer."—Sharífiyyah, page 12.

Hence, where the crime is a justifiable one, there is no exclusion. Thus,—

Principle. CLXX. If a person kills his ancestor or predecessor for retaliation, or by inflicting chastisement under the sentence of a Kází (Judge), or for self-defence, in such case the killer would not at all be excluded (from the inheritance of the killed). The same is the law where a just (or loyal) person killed his ancestor who was a rebel.—Sharífiyyah, p. 12.

Principle. CLXXI. And if the killing be not directly, but by creating a cause, or (in other words) by merely being the occasion of the death, as by digging a pit or well in another's property or land (into which one falls and dies), or by placing upon it a large stone, (against which one stumbles, and death is the consequence), then the expiatory mulct or the price of blood must be paid for the killer by his relations, but neither retaliation nor atonement is ordained therein. Such is also the case if the killer be an infant, or a mad person. In such cases of homicide, there is no exclusion from inheritance.*—Sharífiyyah, page 12.

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clxxi. But being the indirect cause of a person's death is not a sufficient ground for excluding from inheritance; as for instance, when a person has dug a well into which another falls, or placed a stone on the road against which he stumbles, and is killed in consequence.—Fatáwá Alamgírí, vol. vi, page 631.—B. Dig., page 697.

* Homicide is either with malice prepense, and punishable with death; or without proof of malice, and expiable by redeeming a Musalmán slave, or by

CLXXII. When a father has circumcised his child, and the child died in consequence of the operation, the father is not deprived of his right in the child's inheritance.*—Fatáwá Alamgírí, vol. vi, page 631.—B. Dig., page 697.

According to Sháfií, however, the killer of a person does not at all inherit.—Durr-ul-Mukhtár, page 862.

Principle Of the difference of religion.

CLXXIII. Difference of religion—that is difference between Islám and infidelity—is an impediment to succession(*i*).†

ANNOTATIONS.

clxxiii. Difference of religion (between) Musalmáns and infidels (is an impediment to succession.)—Durr-ul-Mukhtár, page 862.

clxxiii. Difference of religion is also an impediment to succession, by which it is meant, the difference between Islám and infidelity.—Fatáwá Alamgírí, vol. vi, page 631.—B. Dig., page 798.

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fasting two entire months, and by paying the price of blood; or thirdly, it is accidental, for which an expiation is necessary. Malicious homicide or murder (for, by the best opinions, the Arabian law on this head nearly resembles our own) is committed, when a human creature is unjustly killed with a weapon, or any dangerous instrument likely to occasion death, as with a sharp stick or a large stone, or with fire, which has the effect, says Kásim, of the most dangerous instrument, and, by parity of reason, with poison or by drowning; but those two modes of killing are not specified by him; and there is a strange diversity of opinion concerning them. Killing without proof of malice is, when death ensues from a beating or blow with a slight wand, a thin whip, or a small pebble, or with any thing not ordinarily dangerous.—Note by Sir W. Jones, page 61.

If, however, a man were to dig a pit, or fix a large stone on the field of another, and the owner of the field were to be killed by falling at night into the pit, or running against the stone, the doer of the illegal act, which was the primary occasion (but not the cause) of the death, must pay the price of blood; but would not, it seems, be generally disabled from inheriting; he ought, one would think, to be incapable of succeeding to the property of the deceased, whom he destroyed, and whom he might have meant to destroy, by such a machination.—*Ibid*, page 62.

* But if he should admonish him with stripes, and the child should die in consequence, he is responsible for the díyat or fine, and loses his right to inherit according to Abú Hanífah, though he is not responsible according to the other two (Abú Yusuf and Muhammad). And if a teacher be the person who punished the child, with the father's permission, he does not incur any liability, according to all their opinions.—Fatáwá Alamgírí, vol. vi, page 631.—B. Dig., page 697.

† *Vide* Sirájiyyah, page 5.

Difference of religion is such an impediment to inheritance, that an infidel cannot, in any case, be an heir to a believer, nor a believer to an infidel.—B. M. L., page 24.

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(*i.*) Thus an infidel shall not inherit from a Musalmán agreeably to the doctrine of all, and a Musalmán shall not inherit from an infidel according to the dictum of Alí, Zayid, and the whole of the Prophet's Companions. This

Example. doctrine is followed by our learned legislators, and also by Sháfií, in accordance with this dictum of the Prophet: "The followers of two different religions shall not inherit from each other."—Sharífiyyah, page 13.

Principle. CLXXIV. The free thinkers (Ahl-ul-hawá) are not, however, excluded from succeeding to orthodox Muhammadans, since they are believers of the Prophets and the scriptures, but differ only in their interpretation of the latter and Sunnat.—Sharífiyyah, page 14.

But a difference of faith among unbelievers, such as Christianity, Judaism, Mujoosseeism, and idolatry, is no impediment to succession, so that there are mutual rights between Christians, Jews, and Mujoossees.*—Fatáwá Alamgírí, vol. vi, page 631.—B. Dig., page 698.—*Vide* Sharífiyyah, page 14.

All infidels, however different their creeds may happen to be, inherit from each other, since they are considered as being of one religion.*—Sharífiyyah, page 13.

Principle Of the difference of country. CLXXV. Difference of country,—either actual, as between an alien enemy and an alien tributary (*a*), or qualified, as between a fugitive (mustámin) and a

ANNOTATIONS.

clxxv. Difference of country (*dár*) is also an impediment to succession, but this applies only to unbelievers, not to Musalmáns. So that if a Musalmán should die in a hostile country (dár-ul-harb), his son in the country of peace (dár-ul-Islám) inherits from him. The difference of country is actual when an alien dies in the dár-ul-harb, having a father or son who is a tributary infidel (Zimmí) in the dár-ul-Islám; and in that case, the Zimmí does not inherit from the alien. In like manner, if a Zimmí should die in the dár-ul-Islám, leaving a father or son in the dár-ul-harb, he would not inherit from him.—Fatáwá Alamgírí, vol. vi, page 631.—B. Dig., page 698.

* An unbeliever shall never be heir to a believer, and conversely; but infidel subjects may inherit from infidels.—Note by Sir William Jones.

tributary (Zimmí), or between two fugitive enemies from two different States (*b*),—is also an impediment to succession. LECTURE VIII.

Because when an alien enemy enters (*i.e.*, takes his domicile in) the country of Musalmáns, obtaining protection (by payment of the tribute exacted from infidels,) then he and the alien tributary, though actually in one country, are in a qualified sense in two different countries, inasmuch as the fugitive is in the qualified sense in the seat of hostility. Do you not see that he may return to it, and there is no probability of his living perpetually in our country, whereas the case is otherwise with the alien tributary. Consequently, they do not inherit from each other.—Sharífiyyah, page 14. Reason.

(*a.*) Thus if an alien enemy die in the abode or seat of hostility (dár-ul-harb,) leaving a father and son who are alien tributaries in the abode or seat of peace (dár-ul-islám), or if an alien tributary die in the seat of peace, leaving a father and son in the seat of hostility, then none of them shall inherit from the other; because the alien tributary being in the seat of peace, and the alien enemy in the seat of hostility, the relationship between them is cut off by the actual difference of country, although they were of the same religion; consequently the (right of) inheritance founded upon (such) relationship is also cut off (or destroyed); inasmuch as the heir succeeds to the ancestor in his property by becoming the owner thereof and appropriating and enjoying the same.*—Sharífiyyah, page 14. Illustration.

(*b.*) As regards the second example (*viz.*, between two fugitive enemies from two different States), if it be supposed, as it is said, that they are two fugitive enemies in their own countries, which are different from each other, then it should be held that they are in a manner actually in two Illustration.

* When an enemy dies in a hostile country, leaving within the Muhammadan territories a father or son who is a Zimmí, or a Zimmí dies in the Muhammadan territories, leaving a father or son who is an enemy and residing in a hostile country, neither can succeed to the other, though they should be of the same religion, because their countries are actually different, the Zimmí being to all intents and purposes a subject of the Muhammadan State.—B. M. L., page 29.

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different countries, (in which instance, this case should have been put before the case in the qualified sense,) but if it be supposed that the two fugitives are actually in two different countries, but they are (living) in the seat of peace by obtaining protection, then they are actually in one country, and in the qualified sense in two different countries;* consequently, what is above said does not apply.—Sharífiyyah, pages 14 & 15.

"When a *Mustámin* dies in our territory, leaving property, it should be sent to his heirs; when a Zimmí dies without heirs, his property goes to the public treasury (bayit-ul-mál)."—Fatáwá Alamgírí, vol. vi, page 631.—B. Dig., page 698.

Principle. CLXXVI. A State differs from another by having different forces and Sovereigns, and there being no community of protection between them (*g*).†

Example. (*g*.) As for instance, if one of the two Sovereigns is in India possessing a State and forces, and the other is in Turkey possessing a different State and forces, and the community of protection is cut off between them, so much

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clxxvi. Countries differ by a difference of armies and governments which cuts off protection between them.—Fatáwá Alamgírí, vol. vi, page 631.—B. Dig., page 698.

* The case is so far different with respect to a Zimmí and a Mustámin, that for the time they are both inhabitants of the same country; but their condition is not the same, the Zimmí being, as already observed, the subject of the Muhammadan State, to which he pays tribute and owes allegiance, and being no longer at liberty to return to the place of his birth. The Mustámin, on the other hand, is only on sufferance in the Muhammadan territory, where he is not permitted to remain longer than a year, and during that time he neither pays tribute, nor is debarred from returning to the country from whence he came, and to which he is held to belong. It is not to be wondered at, therefore, that the Zimmí and Mustámin should be accounted in law as of different countries, and consequently incapable of inheriting the one to the other.—B. M. L., page 29.

† The difference between two States or countries consists in the difference of Sovereigns, by whom protection is given to their respective subjects, and to whom allegiance is respectively due from them. This difference is particularly marked between a country governed by a Muhammadan power and a country ruled by a prince of any other religion; for they are always, vir-

so that each of them considers it lawful to kill the other; and if a man belonging to the army of one of them, finding a man belonging to the army of the other, kills him, then, such two countries are different, and by reason of those being different there shall be exclusion from inheritance, since it (the inheritance) was (allowed) upon the basis of the community of protection and relation. But if there

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tually at least in a state of warfare, the first being called by lawyers the seat of peace, and the second, the seat of hostility. A difference of country, therefore, which excludes from the right of inheriting, is either actual and unqualified, as when an alien enemy resides in the seat of hostility, or when an alien has chosen his domicile in the seat of peace, and pays the tribute exacted from infidels, in which case the tributary shall not be heir to the alien enemy dying abroad, nor conversely, because each of them owed a separate allegiance; or the difference is qualified, as when a fugitive enemy seeks quarter, and obtains a temporary residence in the seat of peace, or when two alien enemies are fugitive from two different hostile countries: now although the tributary and the fugitive actually live in the same kingdom, yet, since the fugitive continues a subject of the hostile power, he remains, as it were, under a different government, and there is no mutual right of succession between him and the tributary; nor, by similarity of reason, between two fugitives, who leave two distinct hostile governments, and obtain quarter for a time in the land of believers, but without any intention of making it their constant abode.—Note by Sir W. Jones, page 62.

Mr. Neil Baillie observes as follows:—

"Countries differ from each other by having different Sovereigns and armies; but Muhammadans, though no longer subject to the sway of one prince, are still accounted of the same country, being connected together by the tie of their common religion. Difference of country is consequently no impediment to inheritance, so far as they are concerned. It is also liable to some modification with respect to unbelievers. In the early ages of the Muhammadan religion, all who were not for it, were considered to be against it, and every infidel was an enemy, on whom it was the sacred duty of the true believer to wage war until he embraced the faith or consented to pay tribute. In later times, some practical relaxation of this doctrine became necessary; and we accordingly find the Turks and some other Muhammadan nations entering into treaties of peace, and even offensive and defensive alliances, with people of a different faith. Difference of country is no impediment to inheritance, between the subjects of kingdoms between which there subsist engagements for mutual assistance against enemies; and a simple treaty of peace would probably have the same effect, though the authorities are not so express upon this point. The reason assigned by the author of the Sirájiyyah, for the difference of country being a bar to inheritance, is the want of mutual protection to the subjects of different States; and it is applicable only to a State of actual warfare, which was probably the condition of the whole world, so far as the author was acquainted with it, at the time that he wrote. The comment on the text also implies a State of hostilities; for it supposes by way of illustration, that if a soldier of one of the States fall in the way of the troops of the other, they may lawfully put him to death. It seems therefore probable that in the present age of the world, the subjects of different countries may lawfully inherit to each other, if there be no other legal impediment, unless their governments be positively opposed in actual warfare."—B. M. L., pp. 30, 31.

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is (between them) alliance and community of assistance against their enemy, then they are (as it were) one State, and there shall be no exclusion from inheritance.—Sharífiyyah, page 15.

To the foregoing principles may be added the following, laid down by the British Courts of Justice in India, and based upon the Fatwás, or law opinions, given by their Muhammadan Law Officers.

1. Suspicion of murder, not fully proved, is no impediment to succession.

Vide Macnaghten's Precedents of Muhammadan Law, Chap. I, Case 7.

2. Presumptive proof of homicide does invalidate one's claim on the ground of gift.

3. One cannot inherit the estate of a deceased proprietor upon the allegation or admission that the deceased was his relative, if he (the claimant) has already denied his having been so, the repugnancy (tanákuz) of one assertion to the other being an impediment to his succession.

Sháh Abadee *v.* Sháh Alí Nukkee.—Sel. S. D. A. Rep., vol. i, p. 73. (New Ed., p. 97).

4. Renunciation in the lifetime of an ancestor is no impediment to the claim of succession after that ancestor's death.

Vide Macnaghten's Precedents of Muhammadan Law, Chap. I, Case 11.

5. Insanity and blindness do not disqualify from inheriting.—*Vide Ibid,* Case 10.

Hajab, defined.

The lexicographic meaning of the word *hajab* is prevention, whence is derived the word *hijáb,* a veil or a screen with which a thing is concealed or covered, and which hinders the vision of that object. In the phraseology of the learned in this science, however, *hajab* signifies exclusion of a certain person or persons either wholly or partially by reason of another person's existence.—Sharífiyyah, page 48. Hence,—

CLXXVII. Exclusion is of two kinds :—1*st*, Imperfect, which is an exclusion from a (larger*) share, and an admission to a (smaller*) share (*a*). 2*nd*, Perfect or total exclusion, by which one is at once excluded from inheritance or deprived of the whole thereof (*b*).—Sirájiyyah, page 20. LECTURE VIII. *Principle.*

(*a*.) The imperfect or partial exclusion takes place in respect of five persons, (*viz.*,) the husband, wife, mother, son's daughter, and the sister by the same father only.† Because the husband is driven (*i.e.*, his share is reduced) Illustration.

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clxxvii. Imperfect exclusion takes place in respect of five persons—the mother, son's daughter, sister by the same father only, husband and wife.—Durr-ul-Mukhtár, page 865.

Six heirs are not entirely excluded in any case, *viz.*, the father, the mother, the son,‡ the daughter, and the husband and wife. And there is a set (of heirs) which inherits in one case and is entirely excluded in another case: they are exclusive of the six (aforesaid,) whether they be residuaries or entitled to shares.—*Ibid*, page 865.

Exclusion is of two kinds—partial and total; and partial exclusion is a reduction from one share to another. As regards total exclusion, there are six persons who are not subject to it. These are the father, the son, the husband, the mother, the daughter, and the wife.—Fatáwá Alamgírí, vol. vi, page 630.—B. Dig., page 695.

Exclusion is either entire or partial. By entire exclusion is meant, the total privation of right to inherit. By partial exclusion is meant a diminution of the portion to which the heir would otherwise be entitled. Entire exclusion is brought about by some of the personal disqualification,§ or by the intervention of an heir, in default of whom a claimant would have been entitled to take, but by reason of whose intervention he has no right of inheritance.—Macn. M. L., Chap. I, Sect. vi, Princ. 84.

* Sharífiyyah, page 48.

† Sirájiyyah, page 21.

‡ In the original hereof, the word 'son' seems to have been omitted by mistake.

§ Slavery, homicide, difference of religion, and difference of allegiance exclude from inheritance.—Macn. M. L., Chap. I, Princ. 6.

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Explanation. (*b.*) There are two sets of heirs—one of which sets is not entirely excluded in any case. This comprises six persons, (*viz.*,) the son, the father, the husband, the daughter, the mother and wife. The other set of heirs (who are other than the above six, and who, whether residuaries or sharers*), inherit in one case, and is entirely excluded in another case.—Sirájiyyah, page 20.

Principle. CLXXVIII. The entire exclusion is grounded upon two principles: The one of which is that—whoever is related to the deceased through any person

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clxxviii. This is grounded on two principles: The one of which is that a person who is related (to the deceased) through another does not inherit with him,—as for instance the son's son does not inherit with the son. Except the mother's children who inherit with her by reason of her not taking the whole inheritance. The second of the two (principles) is, that the nearest excludes those who are not so, but distant, for the reason already stated; that is, the nearest is preferred; then the next in the order of proximity, be they entitled for one and the same cause, or not.—Durr-ul-Mukhtár, page 865.

As regards all others, besides these, the nearer excludes the more remote; and persons who are related through others do not inherit with them, except only the children of the mother, that is half brothers or sisters on her side, who are not excluded by her.—Fatáwá Alamgíri, vol. vi, page 630.—B. Dig., page 695.

* Sharífiyyah, page 48.

shall not inherit while that person is living (*c*) ;— except the mother's children who inherit with her (notwithstanding they are related through her to the deceased*), because she has no title to the whole of inheritance. The other is that the nearest of blood inherits first, then the nearest after him, as explained in (the Chapter on) Residuaries (*d*).—Sirájiyyah, page 21. LECTURE VIII.

(*c*.) For instance, the son's son does not inherit with the son.—Sharífiyyah, page 28. Example.

The ground for this principle is, that if the person through whom one is related (to the deceased,) be entitled to the whole inheritance, the person so related (to the deceased) does not inherit while that person is living, whether their causes of inheritance be one and the same,—as in the instance of a father (existing) with the grandfather, or a son with a son's son; or (whether the causes) be not the same,—as in the case of a father (existing) with brothers or sisters: for when the person through whom another is related takes the whole property, nothing at all remains for the person related (through him); but if the person through whom another is related be not entitled to the whole, then, if the cause of (their) inheritance be one and the same, the case would be the same, (that is, nothing would remain for the person related, and he would not inherit while that person be living,) as in the instance of a mother and mother's mother; because if the person through whom another is related take his or her portion on the ground of such cause, nothing would remain for the person related out of the portion to which he or she would be entitled on the ground of such cause, and no other portion would remain for him or her; consequently, he or she would be entirely excluded; but if the cause of (their) inheritance be not one and the same, as in the instance of the mother and her children, in that case, the person through whom another is related would take his or her portion with reference to the cause of his or her (heritable right,) and the person related would take the other portion in virtue

* Sharífiyyah, page 48.

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of the other cause (of heritable right); then there would be no exclusion. Some, however, say: "Is not the mother entitled to the whole inheritance when she stands alone without sharers and residuaries?" We answer, "this right is not founded on one and the same cause, since she became entitled to the inheritance partly as a sharer and partly by return." The meaning therefore is, that right or title to the whole inheritance should be for one and the same cause, as in the case of residuaries.—Sharífiyyah, page 49.

Explanation.

(*d.*) As is explained in (the Chapter on) Residuaries;—that is, persons nearest in the degree of affinity are preferred; consequently, the nearest of them entirely excludes the distant, no matter whether the cause of their heritable right be the same or not. This (rule) is also applicable to persons other than those (mentioned), provided the cause is one and the same, as in the case of the grandmothers (existing) with the mother, and son's daughters (existing) with two begotten daughters, and the sisters by the same father only (existing) with two sisters of the whole blood.—Sharífiyyah, page 49.

Sisters are excluded by sons and daughters. Grandmothers are excluded by a mother. A sister excludes the children of her deceased sister. A daughter excludes the children of a deceased daughter. Sons and daughters of a whole brother exclude half brothers and half sisters.—Macnaghten's Precedents of Muhammadan Law, Chap. I, Cases x and xxiii–xxvi.

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CLXXIX. The heir of a person who, if he survived the deceased, would have succeeded to the latter, is excluded by one who is nearer in point of relationship.

Precedents.

Mussummat Ekin Bibee *v.* Meer Ali and others.—Sel. S. D. A. Rep., vol. i, page 152.

Abdoor Ruhman, son of Morad Khan and others.—*Ibid,* vol. iii, page 403 (New Ed., page 538).

Doe dem Gholam Abbas *v.* Shaikh Ameer. The same *v.* Tamboo Bibee.—East's Notes, No. cxiii.

CLXXX. A person excluded entirely (for disqualification), as an infidel, a murderer, or a slave, does not (at all) exclude any one (*a*). But a person excluded by another may, as the Learned agree, exclude others, perfectly as well as imperfectly (*b*).—Sirájiyyah, page 22.—Sharífiyyah, page 50. LECTURE VIII. *Principle.*

(*a*.) It is related that a woman, who was a Musalmán, died, leaving her husband, also a Musalmán, and two brothers by the same mother, who also were Musalmáns, and a son, who was an infidel. In this case it was decided by Alí and Zayid, the son of Sábit, that half devolved on the widower, one-third on the brothers, and the rest on the residuaries (the infidel son being considered as dead).—Sharífiyyah, page 50. *Precedent.*

(*b*.) For instance, if there be two or more brothers or sisters, on whichever side they may be, (that is, by both parents or by one of them,) yet they drive (that is, reduce the share of) the mother from a third to a sixth. Such is also the case with respect to perfect exclusion, for the

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clxxx. In our opinion, a person excluded, as an infidel or murderer, does not at all exclude (another person). But the person excluded by another, does, as all the Learned agree, exclude others;—as the father's mother is excluded by the father, but she excludes the mother of the mother's mother; so are brothers and sisters, for they are entirely excluded by the father, but (nevertheless) they reduce the share of the mother from a third to a sixth, which is (a case of) imperfect or partial exclusion.—Durr-ul-Mukhtár, page 865.

One who is deprived of any interest in the estate, that is, one incapable of inheriting as an infidel, a homicide, or a slave, has no effect in excluding others, either partially or totally. But one who is only excluded may exclude others by general agreement; as for instance, two or more brothers or sisters, full or half, on whatever side, who do not inherit when there is a father, but reduce a mother's share from a third to a sixth.—Fatáwá Alamgírí, vol. vi, page 630.—B. Dig., page 695.

Those who are entirely excluded by reason of personal disqualification do not exclude other heirs, either entirely or partially; but who are excluded by reason of some intervening heir, do, in some instances partially exclude others.—Macn. M. L., Chap. I, Sect. vi, Princ. 85.

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father's mother is excluded by him, and yet she perfectly excludes the mother of a mother's mother.—Sharífiyyah, page 51.

General enumeration of the persons excluded.

Most of the examples of exclusion are given in the Fatáwá Alamgírí. They are as follows—Full brothers and sisters are excluded by a son, son's son, and a father, and by a grandfather also, with some difference of opinion. Half brothers and sisters on the father's side are excluded by the same persons, and also by full brothers and sisters; and half brothers and sisters on the mother's side are excluded by a child, the child of a son, a father, and a grandfather, by general agreement. All grandmothers, whether maternal or paternal, are excluded by a mother; and paternal grandmothers are excluded by a father, as a grandfather is excluded by him, and they are also excluded by a grandfather when anterior to him; but a paternal grandmother is not excluded by a grandfather, because she is not anterior to him. Grandmothers on the side of the mother are not excluded by a father; so that if one should leave a father, a father's mother, and a mother's mother, the father's mother is excluded by the father; but there are different opinions as to the mother's mother, some saying that she has a sixth, and others only the half of a sixth. The nearer excludes the more remote, whether himself an heir or excluded. Thus, if one should leave a father, a father's mother, and the mother of a mother's mother, it is said that the father has the whole, because he excludes his mother and she excludes the mother of the mother's mother, because she is nearer to the deceased. There is a difference of opinion as to her succeeding with her son, who is paternal uncle to the deceased; but according to the generality of "our Sheikhs," she does inherit with her son who is the paternal uncle.—Fatáwá Alamgírí, vol. vi, p. 630.—B. Dig., pp. 695 & 696.

LECTURE IX.

ON MARRIAGE.

Preliminary Remarks on Marriage—its Essentials—Conditions including Prohibited Relations—Forms, &c.,—and Effects.

Preliminary Remarks.

MARRIAGE among Muhammadans is not a sacrament but purely a civil contract. And though it is solemnized generally with recitation of certain verses from the Kurán, yet the Muhammadan law does not positively prescribe any service peculiar to the occasion. That it is a civil contract is manifest from the various ways and circumstances in and under which marriages are contracted or presumed to have been contracted. And though a civil contract, it is not positively prescribed to be reduced to writing, but the validity and operation of the whole are made to depend upon the declaration or proposal of the one, and the acceptance or consent of the other, of the contracting parties, or of their natural and legal guardians before competent and sufficient witnesses; as also upon the restrictions imposed, and certain of the conditions required to be abided by according to the peculiarity of the case. The principal of these restrictions are, that a man shall not marry his own slave, nor must he marry another's slave, having already married a free woman, nor a relation within the prohibited degrees, nor two women related to each other within the prohibited degrees, (so that if one of them were a man they could not intermarry;) nor must he marry a woman while four of his wives are living. Although a man is allowed to marry four wives, yet the rights and privileges granted to woman by law, do, in a great measure, check the man from so doing, and compensate for the hardship the daughters of *Islám* are subjected to. Liberty is allowed to an adult woman to marry or not to marry a particular man independent of her guardian, who has no

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power to dispose of her in marriage without her consent, or against her will;* while option is reserved for the girl married by her guardian during infancy to ratify or dissolve the contract immediately on her attaining puberty. When a lady, adult and sane, likes to be married through her guardian, her consent is still essential to the marriage, and she empowers her guardian or another agent in the presence of competent witnesses to convey her consent to the bridegroom; the announcement of her consent or declaration and that of the bridegroom, all before the Kází and witnesses, constitute the marriage. The agent (if a stranger,) need not see her, but it is sufficient that the witnesses who see her satisfy him that she expressly or impliedly consents to the proposition of which he is the bearer. The law respects the modesty of the sex, and allows the expression of consent on the part of the lady by indirect ways, even without words. With a virgin, silence, for instance, is taken as consent, and so is a smile or a laugh not evidently indicative of sneer or jest. The consent of others than virgins must, in all cases, be pronounced in so many words. It will be seen that the liberty of choice of women is well secured. There are two things which seem to curtail this liberty, namely, the power of guardians to contract the marriage of minors without their consent, and the necessary agency of guardians and friends even in the marriage of adults. But in the case of the marriage of a girl in her minority, she has the right to repudiate the marriage immediately on reaching her majority.

Marriage defined.

Nikáh, in its primitive sense, signifies carnal connection. But in law, it means a particular contract used for the pur-

* A wife has her rights, and more respect, perhaps, is paid to them by the law than even to those of the husband. Her consent, as I have before observed, is required to marriage. If the lady has arrived at puberty and is sane, her consent is essential. In fact, such a woman can dispose of herself according to her choice in any way she likes, and her guardians or parents have no right of interference. So strongly is this freedom of choice upheld by the law, that even among certain small sects, who deny woman's capacity to give herself in marriage, if any woman should marry herself against the wishes of her parents to any one, either of her own tribe or any other, the union would be deemed valid. Not even a king can give his daughter in marriage without her consent.—Remarks by Moulaví Abdul Latíf Khán Bahádur, contained in his Essay on Marriage and Dower.

pose of legalizing generation.*—*Vide* Hamilton's Hidáyah, Vol. I, page 71. LECTURE IX.

CLXXXI. Declaration and acceptance, or, in other words, proposal and consent (*a*) in the same meeting (*b*), are the essentials of marriage.† *Principle.* Essentials.

(*a.*) In law, 'Declaration' signifies the speech which first proceeds from one of the two contracting parties, and 'consent,' the speech which proceeds from the other in reply to the declaration or proposal. Explanation.

(*a.*) Marriage is contracted by declaration and acceptance, when both are expressed by words (verbs) of the past tense, or when one of them is expressed in the past, and the other in the imperative or present, so that when a man had said to a woman, "I marry thee for this," and she has said, "I have accepted," the contract is complete, even though he should not reply, "I have accepted," And if he should say, "marry thyself to me," and she should accept, the contract is effected, provided that he did not intend a future time by the expression.—Fatáwá Alamgírí vol. i, page 381.—B. Dig., page 14. Further explanation.

When a person says to the father of a girl, "hast thou married thy daughter to me?" and he answers, "I have married," or "yes;" there is no marriage until the man say after this, "I have accepted;" for, his first words 'hast thou married thy daughter to me?' are merely interrogative, (and not *ijáb*, or declaration).—Fatáwá Alamgírí, vol. i, page 384.—B. Dig., page 17.

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clxxxi. The pillars of marriage, as of other contracts, are *ijab-o-kabúl*, or declaration and acceptance.—Fatáwá Alamgírí, vol. i, page 377.—B. Dig., page 4.

* Marriage is a contract which has for its design or object the right of enjoyment and the procreation of children. But it was also instituted for the solace of life, and is one of the prime or original necessities of man.—B. Dig., page 4.

A marriage is valid, although no mention be made of the dower by the contracting parties, because the term *Nikáh*, in its literal sense, signifies a contract of union, which is fully accomplished by the union of a man and woman.—Hidáyah, vol. i, page 122.

† Proposal and consent are essential to a contract of marriage.—Macn. M. L., Chap. VII, Princ. 2.

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Principle.

CLXXXII. Marriage is contracted, that is to say, effected and legally confirmed, by means of declaration (*ijáb*) and consent (*kabúl*), both expressed in the preterite* (*b*). — Hidáyah, vol. i, page 72.

Explanation.

(*b*.) The declaration and acceptance must be expressed at one meeting (*majlis*);† and if there be a change in the meeting—as for instance, if both parties being present, one of them should make a declaration, and the other should then rise from the meeting before the acceptance, or should take to some other occupations which would occasion a change of the meeting, there is no contract. In like manner, when one of the parties is absent, there is no contract.—Fatáwá Alamgírí, vol. i, page 379. B. Dig., page 10.

The words by which marriage is contracted are of two kinds, Saríh (plain), and Kináyat or Kináyah (ambiguous, metaphorical, or implicative). The saríh or plain words are *Nikáh* and *tajvíz*. All the others are Kináyah, and they comprehend every word that is employed to effect an immediate ownership of a specific thing.—Fatáwá Alamgírí, vol. i, page 382.—B. Dig., page 15. So,—

Principle.

CLXXXIII. Marriage may be effected by the word '*hibah*,' or gift, sale, purchase, or the like (*c*).

Illustration.

(*c*.) As if a woman were to say, "I have bestowed myself upon you." Likewise by the word "*tamlík* or consign-

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clxxxiii, Thus marriage is contracted by *hibah*,‡ or gift, *tamlík*, or transfer, and *sadkat*, or alms. So also by the word *bayi*, or sale.—Fatáwá Alamgírí, vol. i, page 382.—B. Dig., page 15.

As if a woman should say, "I have sold myself to thee," or a father should say, "I have sold my daughter to thee for so much."—*Ibid.*

* The reference of marriage to a future time, and its suspension on a condition, are not valid.—Fatáwá Alamgírí, page 383.—B. Dig., page 17.

† If the parties contract while walking together, or riding together, the contract is not lawful; but if they are in a boat which is in progress, the contract is lawful.—Fatáwá Alamgírí, vol. i, page 380.—B. Dig., page 11.

‡ This and the two following terms are such as are used where the woman does not stipulate any dower.—Hidáyah, page 73.

ment;"—as if she were to say, "I have consigned myself over to you;" and so by the word "*Sadkah* or alms-gift,"—as if she were to say, "I have given myself as an alms to you." Marriage may also be contracted by the use of the term "*bayi* or sale;"—as if a woman were to say to a man, "I have sold myself into your hands." And this is approved, because sale operates as the principle of right in the person, and a right in the person is the principle of a right of carnal conjunction, whence the propriety of the metaphorical application of sale to matrimony.—Hidáyah, Vol. I, 73.

In like manner, it is contracted by the word "*Shira* or purchase;"—as if a man should say to a woman, "I have bought thee for so much," and she should make answer by "yes." And if a man should say to a woman, "Thou art mine," or "hast become mine," and she should answer "yes." So also if he should say, "Be my wife for a hundred," or "I have given you a hundred that you may be my wife," and she should accept, it is a marriage.* If a woman, irrevocably repudiated, should say, "I have restored myself to thee," and the husband should answer, "I have accepted," in the presence of witnesses, that is a marriage. So also if a man, after he has repudiated his wife three times, or irrevocably, should say, "I have recalled thee on so much," and the woman is content, and the transaction takes place in the presence of witnesses, it is a valid marriage; and it would be so even though no mention were made of any property, provided that both parties are agreed that the husband intended marriage. But if the same words were addressed to a stranger, and the woman should consent, there would be no contract.—Fatáwá Alamgírí, vol. i, p 382.—B. Dig., page 15.

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* But it is not contracted by *taatí* or mutual surrender, nor by writing between parties who are present; so that if the man should write, "I have married thee," and the woman should write, "I have accepted thee" there is no contract.—Fatáwá Alamgírí, vol. i, page 382.—B. Dig., pages 14 & 15.

Marriage is not contracted by the words *ijárat* or hiring, *iárat* or lending, *ibáhat* or permitting, *ihlál* or legalizing, *tamuttua* or enjoying, *ijázat* or allowing, *razá* or being content, and the like. Nor by the words *sulh* or compounding, and *bardt* or releasing; nor by the words *shirkat* or partnership, and *iták* or emancipating; nor by the word *wasíat* or bequeathing, for though this is a cause of property, its effect is postponed till after death.—Fatáwá Alamgírí, vol. i, page 383.—B. Dig., pages 15 & 16.

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CLXXXIV. As marriage is contracted by speech, so also it may be contracted in the case of a dumb person by signs, when the signs are intelligible.—Fatáwá Alamgírí, vol. i, page 382.—B. Dig., page 14.

Principle.

Principle.

CLXXXV. A proposal of marriage may be made by means of an agent or guardian, or by a letter; provided there are witnesses to the receipt of the message or letter, and to the consent on the part of the person to whom it was addressed (*d*).*

(*d*.) But if the man should send to the woman a message or write her a letter to the same effect, and she should declare her acceptance in the presence of two witnesses who have heard the word of the messenger, or the reading of the letter, the contract would be lawful by reason of the unity of the meeting in spirit.—Fatáwáh Alamgírí, vol. i, page 380.—B. Dig., page 11.

And if she should say: "such an one has written to me, asking me in marriage, bear ye witness that I have married myself to him," the marriage would be valid, because the witnesses hear her words in her declaration of the contract, and they also hear the words addressed to her in her repetition of them. It makes no difference whether the messenger be free or a slave, a minor or adult, just or unjust, for he merely conveys the expressions of the sender.—Fatáwá Alamgírí, vol. i, page 380.—B. Dig., page 11.

If a man desire another to contract his daughter (being an infant) in marriage to a third person, and the other should accordingly contract his daughter, upon the spot, to the third person, in the presence of the person so desiring, and the act be witnessed only by one person besides these two, the marriage is lawful; because in this case, the father, as being upon the spot, is considered as the actual contractor of the marriage (on behalf of his daughter); wherefore the second person standing merely as the negotiator of the contract, and of course not appearing as a party in it, is a competent witness with the other. But if the

* *Vide* Macn. M. L., page 54. This will be afterwards stated in *extenso*.

father of the infant aforesaid should go away, and be not actually present at the execution of the contract, the marriage would be null; because the father, as not being present, cannot be considered as the contractor, that appellation properly applying to the other, who appears to act in his absence, as his matrimonial agent on his daughter's behalf; consequently, here would be only one competent witness present; and one evidence is not sufficient; whence the marriage would be illegal. And the rule is the same where a father matches his daughter (being an adult,) at her desire, in the presence of one other witness; that is to say, if the daughter be herself present at the execution of the contract it is legal, otherwise not.—Hidáyah, vol. I, pages 75 & 76. LECTURE IX.

If the father of the girl should say to the father of the boy, "I have married my daughter," without further addition, and the father of the boy should say, "I have accepted," the marriage would take effect as to the father himself. This is approved and is correct.—Fatáwá Alamgírí, vol. i, page 381.—B. Dig., page 13.

CLXXXVI. The principal conditions or requisites of marriage* are,—that both the contracting parties be sane or discreet (*e*), adult (*f*), and free (*g*); —that they should together hear the words of each other (*h*);—that the female (being an adult) should give her consent (*i*);—that the declaration and acceptance should take place at one and the same meeting;†—that the acceptance be not discrepant with or from the declaration (*j*);—that the man and woman to be married be known, *i.e.*, *Principle.*

* The conditions are discretion, puberty, and freedom of the contracting parties. In the absence of the first condition, the contract is void *ab initio*; for a marriage cannot be contracted by an infant without discretion, nor by a lunatic. In the absence of the two latter conditions, the contract is voidable; for the validity of marriages contracted by discreet minors, or slaves, is suspensive on the consent of their guardians or masters. It is also a condition, that there should be no legal incapacity on the part of the woman; that each party should know the agreement of the other; that there should be witnesses to the contract; and that the proposal and acceptance should be made at the same time and place.—Macn. M. L., Chap. VII, Princ. 3.

† See *ante*, page 294.

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identified (*k*);—that they be equal to each other (*l*);—that there be witnesses to the contract (*m*);—and that the woman be a fitting subject (*n*).

There are several conditions or requisites of a contract of marriage, among which are the following:*—

(*e*, *f*, *g*.) Understanding, puberty, and freedom in the contracting parties; with this difference between the conditions that the first of them is essential, for marriage cannot be contracted by an insane person, nor by a boy without understanding, but the other two are required only to give operation to the contract, for the marriage contracted by a boy of understanding is valid, though dependent for its operation on the consent of his guardian, and that by a slave is so also, but dependent on the consent of his master.—Fatáwá Alamgírí, vol. i, page 377.—B. Dig., page 4.

(*h*.) The hearing by each of the parties of the words spoken by the other. And if they should contract by means of an expression which they do not understand to signify marriage, still, according to the approved opinion, the contract would be effected.—Fatáwá Alamgírí, vol. i, page 377—B. Dig., page 5.

(*i*.) A woman who is an adult, and of sound mind, may be married by virtue of her own consent, although the contract may not have been made or acceded to by her guardians, and this, whether she be a virgin or a *Sayyibah*.† This is the opinion of Abú Hanífah and Abú Yusúf as appears in Záhir-ur-Rawáyat.‡—Hidáyah, vol. i, pages 95 & 96.

(*i*.) The consent of the woman is also a condition, when she has arrived at puberty, whether she be a virgin, or a *Sayyibah*, that is, one who has had commerce with a man; so that, according to us, a woman cannot be compelled by her guardian to marry.—Fatáwá Alamgírí, vol. i, page 379.—B. Dig., page 10.

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* Fatáwá Alamgírí, vol. i, page 377.—B. Dig., page 4.

† A woman who has already had carnal intercourse with a man.

‡ It is also recorded that Muhammad afterwards adopted the sentiments of the two elders upon this point, and agreed with them.—Hidáyah, vol. i, page 96.

(*i.*) No one, not even a father, or the Sultan, can lawfully contract a woman in marriage who is an adult and of sound mind, without her own permission, whether she be a virgin or *Sayyibah*. And if any one should take upon himself to do so, the marriage is suspended on her sanction; if assented to by her, it is lawful; if rejected, it is null.—Fatáwá Alamgírí, vol. i, page 405.—B. Dig., page 55.

(*i.*) If a guardian propose a marriage to a *Sayyibah*, (or woman with whom a man has had carnal connexion), it is necessary that her compliance be particularly expressed by words, such as, "I consent to it," because the Prophet has said "*Sayyibahs* are to be consulted," and also because a *Sayyibah*, having had connexion with man, has not the same pretence to silence or shyness as a virgin, and consequently the silent signs before intimated are not sufficient indications of her assent to the proposed alliance.—Hidáyah, vol. i, page 98.

(*j.*) If one person should say to another "I have married to you my daughter, for a thousand *dirms*," and the other should answer, "I have accepted as to marriage, but do not accept as to the *mohr* or dower," the contract would be null; if he should say "I have accepted the marriage," and should remain silent as to the dower, the marriage would be contracted between them.—Fatáwá Alamgírí, vol. i, page 380.—B. Dig., pages 11 & 12.

(*k.*) It is further a condition that the husband and wife shall both be known or identified; and, if a man, having two daughters, should give one of them in marriage, saying only "his daughter," the contract would not be valid, unless one of them were already married, when it would be deemed to have reference to the unmarried one.—Fatáwá Alamgírí, vol. i, page 381.—B. Dig., page 12.

(*l.*) In marriage, regard is had to equality, because the Prophet has commanded, saying: "Take ye care that none contract women in marriage but their proper guardians, and that they be not so contracted but with their equals." Equality is regarded with respect to lineage, this being a source of distinction among mankind; thus it is said: "a Kuresh is equal to a Kuresh throughout all their tribes." In like manner they say, "an Arab is the equal of an Arab." *Mowálís*, that is to say *Ajams*, who are neither Kureshís nor Arabs, are the equals of each other, regard

LECTURE IX.

not being had among them to lineages, but to Islám: equality in point of freedom is the same as in point of Islám in all the circumstances above recited, because bondage is an effect of infidelity, and properties of meanness and turpitude are therein found. Regard is to be had to piety and virtue according to Hanífah and Abú Yusuf; and this is approved, because virtue is one of the first principles of superiority. Equality is to be regarded with respect to property, by which is understood a man being possessed of sufficiency to discharge the dower and provide maintenance, because if he be unable to do both, or either, of these, he is not the equal of any woman, as the dower is the consideration for the carnal use of the woman, the payment of which is necessary of course; and upon the provision of a support to the wife depends the permanency of the matrimonial connection; and this therefore is indispensable *â fortiori*—Hidáyah, vol. i, pages 110—113. However,—

Except *Islám* and freedom, equality in any other respect is not invariably observed in *Ajam* or in a country other than Arabia.

It is laid down in the Sharh-ul-Vikáyah that marriage of a woman who is free, sane and adult is effectual without the (consent of her) guardian, even though there be inequality (between the married couple). The guardian, however, is competent to object to her being married to one who is not her equal: Hasan, however, reports from Abú Hanífah that marriage with an unequal is invalid; and upon this, decision is given in the Fatáwá Kází Khán.—Sharh-ul-Vikáyah, vol. ii, page 232.

(*m.*) *Shahádut*, or the presence of witnesses, which, all the Learned are agreed, is requisite to the legality of marriage. This condition is peculiar to marriage, which is not contracted without the presence of witnesses, contrary to the case of other contracts, where their presence is required, not for contracting, but only with a view to manifestation before the judge.—Fatáwá Alamgírí, vol. i, page 377.—B. Dig., page 5.

(*m.*) There are four requisites to the competency of witnesses, *viz.*, freedom, sanity, puberty, and *Islám* or possession of Muhammadan faith.—Hence marriage is not contracted in the presence of slaves, and there is no

difference in this respect between absolute slaves, *mudabbars* or *mukátabs*,* nor in the presence of insane persons, nor of minors, nor of infidels, when the marriage is between Musalmáns.—Fatáwá Alamgírí, vol. i., page 377.—B. Dig., page 6.

(*m.*) The marriage, where both the parties are Musalmáns, cannot be contracted but in the presence of two male witnesses, or one man and two women, who are sane, adult, and Musalmáns, whether they be of established integrity of character or otherwise, or may ever have suffered punishment as slanderers.† It is necessary that the witnesses be free, the evidence of slaves being in no case valid, because such are not competent to act in any respect *sui juris:* and it is also requisite that they be of sound mind and mature age, because minors and idiots are incapable of acting for themselves; and it is likewise necessary that they be Musalmáns, the evidence of infidels not being legal with respect to Musalmáns.—Hidáyah, vol. i, page 74.

There must, however, in all cases, be more than one witness; but it is not necessary that all the witnesses should be males, for marriage may be contracted with one man and two women for witnesses; but not with women only, without a man.—Fatáwá Alamgírí, page 378.—B. Dig., pages 6 & 7.

If the husband be a Musalmán and the wife a Zimmíah, their marriage may be contracted with two Zimmís for witnesses, whether they be of the same or of a different faith from the wife.—Fatáwá Alamgírí, page 377.—B. Dig., page 6.

And the Islám of the witnesses is not condition to the marriage of two infidels, for marriage may be contracted with two infidels for witnesses, whether they agree with, or differ from, the parties in religion.—Fatáwá Alamgírí, page 377.—B. Dig., page 6.

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* See *ante*, page 275.

† Marriage is valid when contracted in the presence of two profligates, or two blind persons. So also of two persons who have undergone the *hadd* or specific punishment for slander, or for adultery or fornication. It may also be contracted with persons for witnesses whose testimony in other cases could not be received in favor of the parties; as for instance, the sons of one of them.—Fatáwá Alamgírí, vol. i, page 377.—B. Dig., page 6.

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The time when the presence of the witnesses is required is the time of the declaration and acceptance, not the time of the allowance of the contract; so that if a contract be dependent on the permission of a party, and the witnesses were not present at the time when the contract was entered into, it would not be lawful.—Fatáwá Alamgírí, page 379.—B. Dig., page 10.

It is further a condition of marriage that the witnesses shall hear the words of both the contracting parties together. Hence it cannot be contracted in the presence of two sleepers who have not heard the words of both the contracting parties, nor of two persons so deaf that they cannot hear: but the objection does not extend to a person who is dumb or tongue-tied, if he can hear. If the witnesses should hear the speech of one of the parties, and not that of the other, or if one of the witnesses should hear the speech of one of the parties, and the other that of the other, the marriage is not lawful. So, also, if both the witnesses should hear both the parties, but hear them separately,—as for instance, if the marriage should first take place in the presence of one of the witnesses, and should then be repeated in the presence of the other, who was absent on the first occasion, it would not be valid. And if it should take place in the presence of two men, one of whom is partially deaf, and if the hearing witness should hear, but not the one who is partially deaf, and the former, or a third party, should then call aloud the words in the ear of the latter, the marriage would not be lawful until they both hear the contracting parties at once.—Fatáwá Alamgírí, vol. i, page 378.—B. Dig., page 7.

If two persons hear the words of the contracting parties, but do not understand their meaning, it has been said that the contract is valid; but apparently it should be the contrary, and there is a report of Muhammad, that when a man married in the presence of two Turks or two Hindoos, he said, that if the witnesses can explain what they heard, the contract is lawful, but otherwise not so. Is it then a condition that the witnesses shall understand the contract? It is said in some *fatáwá*, or decisions, that regard is to be had to hearing without comprehending; so that if one should marry with Ajumees, or Persians, for witnesses, the contract would be lawful; but Zaheer has said (and appa-

rently he is right) that their comprehension of the contract is also a condition, and this is correct. But though the witnesses were drunk, and had no recollection of the transaction when they became sober, yet if they apprehended the matter at the time, marriage is contracted. In the *Fatáwá* of Abú Leeth, it is stated that if a man should address several persons, saying, "bear witness that I have married the woman who is in this house," and the woman should answer, "I have accepted," and the witnesses should hear her speech without seeing her person, and she were alone in the house, the marriage would be lawful; but not so if there was another woman in the house with her at the same time. A person marries his daughter to a man in a house, and there are several persons in another house who hear the transaction, but are not called upon to bear witness to it, yet if there be an opening between the houses through which the persons can see the father, their testimony will be accepted, but otherwise not.—Fatáwá Alamgírí, vol. i, page 378.—B. Dig., pages 7 & 8.

A woman appoints a man her agent to marry her to himself, and the agent says in the presence of witnesses, "I have married such an one," the witnesses being ignorant who the such an one is, the marriage is not lawful unless her name, and the names of her father and grandfather, be mentioned. But if the woman be actually present, though veiled and unknown to the witnesses, the marriage is lawful. It would, however, be a proper precaution to uncover her face that the witnesses may see her, or to mention her name and the names of her father and grandfather. If the woman be known to the witnesses, though absent, and the husband mentions her name only, the witnesses understanding him to intend the woman with whom they are acquainted, the marriage is lawful.—Fatáwá Alamgírí, vol. i, page 378.—B. Dig., page 9.

(*n.*) A fitting subject,—that is the woman must not be one who cannot lawfully be contracted to the man,*—as by reason of consanguinity, affinity, fosterage, polytheism, repudiation and slavery, or being involved in the right of one of the married couple.

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* *Vide* Fatáwá Alamgírí, vol. i, pages 385—399.—B. Dig., pages 23—44.

LECTURE IX.

Hence,—

Principle. CLXXXVII. It is not unlawful for a man to marry a slave who belongs to another person, even though he should have the means of marrying a free woman and has not already married such a woman.*

ANNOTATIONS.

clxxxvii. It is lawful for a man to marry a slave who is neither a Muslimah, nor a Kitábíah, even though he have the means of marrying a free woman.—Fatáwá Alamgírí, vol. i, page 395.—B. Dig., page 37.

clxxxvii. It is lawful for a Musalmán, who is free, to marry a slave, whether she be a Muslimah or Kitábíah, although he be in circumstances to marry a free woman,—that is to say, able to pay dower, and afford an adequate maintenance for such a woman. It is, however, unlawful for a man already married to a free woman to marry a slave, the Prophet having issued a precept to this effect: "do not marry a slave upon (*i. e.*, along with) a free woman." But a man may lawfully marry a free woman upon a slave, the Prophet having so declared: "Moreover, a woman who is free is lawful under all circumstances, the principle of the restriction before mentioned not operating with respect to such a woman.—Hidáyah, vol. i, pages 86 & 87.

A father may lawfully marry the bond-maid of his son according to us. A female captive may lawfully marry any one but her captor, when she has been captured alone, without her husband, and brought within the Mooslim territory, according to all opinions, and she is not bound to observe an *iddat;* and in like manner a Moohajirah, or fugitive from her own country to ours, may lawfully marry, and is not bound to observe an *iddut*, according to Abú Hanífah. But Abú Yusuf and Muhammad have said that an *iddat* is incumbent upon her, and that her marriage is not lawful. There is no difference of opinion among them as to the unlawfulness of connection with her before purification by the occurrence of her courses.—Fatáwá Alamgírí, vol. i, p. 396.—B. Dig., page 39.

* Marriage cannot be contracted with a person who is the slave of the party, but the union of a freeman with a slave, not being his property, with the consent of the master of such slave, is admissible; provided he be not already married to a free woman.—Macn. M. L., Chap. VII, Princ. 11.

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CLXXXVIII. Marriage with a kitábí woman (*o*) is legal; but it is unlawful to marry a Majúsí woman. It is also unlawful to marry a Pagan woman (*p*). *Principle.*

(*o.*) All who believe in a heavenly or revealed religion, and have a kitáb, or book that has come down to them, such as the book of Abraham and Seth, and the Psalms of David, are Kitábís, and intermarriage with them, or eating of meat slaughtered by them, is lawful.—Fatáwá Alamgírí, vol. i, page 397.—B. Dig., page 41. *Explanation.*

Consequently, Christians, Jews, and persons believing in one God may be espoused by Musalmáns.*

(*p.*) It is unlawful to marry a Majúsí woman, God having said: "Ye may hold correspondence with the Majúsís, the same as with the Kitábís, but ye must not marry their daughters, nor partake of their sacrifices."—Hidáyah, vol. i, page 84.

(*p.*) According to the words of the *Kurán*, "marry not a woman of the Polytheists, until she embrace the faith."—Hidáyah, vol. i, pages 84, 85.

CLXXXIX. A Musalmán may marry a woman of the Sabeans, she believing the Scriptures, and possessing faith in the Prophets (*q*). But if she worship the stars, and believe not in any of the divine scriptural revelations, it is unlawful to marry her,—such being idolators.*—Hidáyah, vol. i, p. 85. *Principle.*

ANNOTATIONS.

clxxxviii. It is unlawful to marry a pagan woman, according to the word of God, "women are lawful to you such as are *Muhsanas* of the scriptural sect:" (the term 'Muhsana' does not in this passage imply a Muslamite, but merely a woman of chaste reputation). Free Kitábí women and those who are slaves are equal in point of matrimonial legality.—Hidáyah, vol. i, page 84.

clxxxviii, clxxxix. A Muslim is not to have carnal intercourse with an idolatress or a Mujúsíah by right of property, but he may lawfully marry a Kitábíah, whether she be an enemy or a subject, free or a slave, though it is better to refrain.—Fatáwá Alamgírí, vol. i, pages 398, 399.—B. Dig., pages 40, 41.

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* Macn. M. L., Chap. VII, Princ. 11.

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Explanation.

(*q.*) With regard to Sabean women, they are lawful to Muslims, though, according to Abú Hanífah, the connection is abominable; but according to the other two, it is not lawful. The reason of this difference of opinion is, that Abú Hanífah looked upon them as a kind of Nazarenes who read the psalms of David, and venerate certain stars only as Muslims do the *kiblah* of Mecca; while the other two consider their veneration of these stars tantamount to worship, and class them with idolators.—Fatáwá Alamgírí, vol. i, page 397.—B. Dig., page 41.

Principle. CXC. Idolatresses and Majúsíahs are lawful to all infidels except apostates.—Fatáwá Alamgírí, vol. i, page 398.—B. Dig., page 42.

Principle. CXCI. Zimmís or infidel subjects may lawfully marry with Zimmíahs, though of a different persuasion.—*Ibid.*

Principle. CXCII. It is lawful to marry a Kitabíah upon a Muslimah, and a Muslimah upon a Kitabíah, both being in this respect equal in class upon their equality in regard to the lawfulness of marriage.—Fatáwá Alamgírí, page 398.—B. Dig., page 42.

Principle. CXCIII. A man may marry two women, one of them being a widow, and the other the daughter of that widow's former husband, by another wife, because there exists no affinity either by blood or fosterage.—Hidáyah, vol. i, page 80.

The rules mentioned with regard to two sisters apply equally to all other near relatives, who cannot be lawfully joined together in connection with a man.—*Vide* Principles cxcviii—ccl.

Principle. CXCIV. If a man desire to marry one of the two (sisters) after separating from the other, he is at liberty to do so, provided that the separation take place before consummation; but if it do not take place till after the consummation, he must wait till

the expiration of both their *iddats*. When the *iddat* of one has expired, but not that of the other, he may marry the woman who is still in her *iddat*, but not the other, until the unexpired *iddat* be also completed. If consummation with one only has taken place, he may marry that one, but not the other, until the expiration of her sister's *iddat*, and when that has expired, he may marry whichever of them he pleases.—Fatáwá Alamgírí, vol. i, page 392.—B. Dig., pages 32, 33.

Women whom it is prohibited to marry.

There are certain women who are not fit subjects of marriage to certain men, that is to say, whom they are prohibited to marry on account of consanguinity, relationship, or a special cause or causes.

Most of them are as follow:—

Principle.

CXCV. A man cannot lawfully marry his mother, nor his step-mother, nor his paternal or maternal grandmother how high soever, nor his daughter, nor his granddaughter how low soever, nor his sister of the whole or half blood, nor his paternal and maternal aunts, nor those of his parents, nor the daughter of his brother or sister, whether of the whole or half blood (*r*), nor his mother-in-law (*s*), nor the daughter or granddaughter of his wife already consummated (*t*), nor the wife of his son or son's son how low soever, nor the wife of his daughter's son (*u*), nor his foster-mother, nor any other female related, as above, by fosterage (*v*).*

(*r*.) A man must not marry his mother, nor his paternal and maternal grandmothers, because the word in the *Kurán* says, "Your *ams* (or mothers) and your daughters are for-

* Sir William Macnaghten says,—"A man may not marry his own mother, nor his grandmother, nor his mother-in-law, nor his step-mother, nor his step-grandmother, nor his daughter, nor his granddaughter, nor his daughter-in-law, nor granddaughter-in-law, nor his step-daughter, nor his sister, nor his niece, nor his aunt, nor his nurse."—(Macn. M. L., Chap. VII, Princ. 9, 10): So he leaves out several other female relatives above and hereafter mentioned

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bidden to you," and the primitive sense of the term '*am*' being origin or root, the grandmothers are comprehended in this prohibition. The illegality of such a contract is, moreover, supported by the united opinion of our Doctors, on the authority of the text above quoted, a man may not marry his daughter, nor his granddaughter, nor any of his direct descendants. Neither may a man marry his sister, nor his sister's daughter, nor his brother's daughter, nor his paternal aunt, nor his maternal aunt, prohibition of such marriage being included in the foregoing text.—Hidáyah, vol. i, pages 76, 77.

(*r.*) Women who are prohibited by reason of consanguinity are mothers, daughters, sisters, aunts, paternal and maternal, brothers' daughters, sisters' daughters;—marriage or sexual intercourse with them or even soliciting them to such intercourse being prohibited for ever;* that is all times and under any circumstances.—Fatáwá Alamgírí, vol. i, page 385.—B. Dig., page 23.

(*r.*) Mothers are a man's own mother, his grandmothers by the father's or mother's side how high soever. Daughters are the daughters of his loins, and the daughters of his sons or daughters how low soever. Sisters are the full sisters, and the half sisters by the father or by the mother. And so as to the daughters of the brother and sister, and how low soever. Paternal aunts are of three kinds: the full paternal aunt, the half paternal aunt by the father (that is, the father's half sister by his father), and the half paternal aunt by the mother (or the father's half sister by his mother). And so also the paternal aunts of his father, the paternal aunts of his grandfather, and the paternal aunts of his mother and grandmothers. Maternal aunts are the full maternal aunt, the half maternal aunt by the father (that is, the mother's half-sister by her father), and the half maternal aunt by the mother (or the mother's half-sister by her mother), and the maternal aunts of fathers or mothers.—*Ibid.*

* The prohibition is contained in the following passage of the *Kurán*, "Ye are forbidden to marry mothers, and your daughters, and your sisters, and your aunts—both on the father's and mother's side; and your brother's daughters, and your sister's daughters."—Sale's Translation, vol. i, page 92.

(*r.*) All the degrees of aunts are also included in this prohibition; to wit, maternal and paternal aunts, as well as the aunts of the father, and the aunts of the mother, both paternal and maternal: so also daughters of all brothers; that is to say, of the full brother and of the paternal brother, and of the maternal brother, and in the same manner, daughters of all sisters; to wit, of the full sisters, and of the paternal sisters, and of the maternal sisters, because the terms '*amma*, *khálah*, *ukh* and *ukht*,' which occur in the passage of the *Kùrán* already cited, apply to all those degrees of kindred.—Hidáyah, vol. i, page 77.

It is not lawful for a man to marry the wife of his father, or of his grandfather, God having so commanded, saying, "Marry not the wives of your progenitors."—*Ibid*, page 78.

(*s*, *t.*) It is not lawful for a man to marry the wife's mother, whether he may have consummated his marriage with her daughter or not, the Almighty having prohibited such a connection in general terms, without any regard to that circumstance: neither is it lawful for a man to marry the daughter of his wife; but this only, provided he have already consummated his marriage with the latter, because the sacred text restricts the illegality of this union to that circumstance, wherefore marriage with the daughter of the wife is illegal, where carnal connection has taken place with the latter, whether the daughter be an inmate of the husband's *haram* or not.*—Hidáyah, vol. i, page 77.

(*s*, *t*, *u.*) Prohibited by reason of affinity are—*First*, the mothers of wives† and their grandmothers by the father's

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* If a man commit Zinná (fornication or adultery) with a woman, her mother and daughter are prohibited to him.—Hidáyah, vol. i, page 81.

If a woman touch a man with lust, the mother and the daughter of that woman are thereby prohibited to him.—Hidáyah, vol. i, page 82.

† The prohibition of affinity is established by a valid marriage, but not by one that is invalid. So that if a man marry a woman by an invalid contract, her mother does not become prohibited to him by mere contract, but sexual intercourse. And the prohibition of affinity is established by sexual intercourse, whether it be lawful or apparently so, or actually illicit.

When a man has committed fornication with a woman, her mother, how high soever, and her daughters, are prohibited to him. And the woman herself is prohibited to his father and grandfather how high soever, and to his sons, how low soever.—Fatáwá Alamgírí, vol. i, page 386.—B. Dig., page 24.

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or mother's side. *Secondly*,—the daughters of a wife or of her children how low soever; subject to this condition, that consummation has taken place with their mother, that is, the wife, and whether the daughter be under the husband's protection or not. "Our" masters do not account retirement with a wife equivalent to actual consummation in rendering her daughters prohibited. The *third* degree of affinity comprises the wife of a son, or of a son's son, or of a daughter's son, how low soever, whether the son have consummated with her or not; but the wife of an adopted son is not prohibited to the adoptive father. The *fourth* degree are the wives of fathers and of grandfathers, whether on the father's or mother's side, and how high soever. And with all these, marriage or sexual intercourse is prohibited for ever.—Fatáwá Alamgírí, vol. i, page 386.—B. Dig., page 24.

(*v.*) Every woman prohibited by reason of consanguinity and affinity is prohibited also by fosterage, as will be explained in the book of fosterage.—Fatáwá Alamgírí, vol. i, page 390.—B. Dig., page 30.

(*v.*) It is not lawful for a man to marry his foster-mother, or his foster-sister, the Almighty having commanded saying,—"Marry not your mothers, who have suckled you, or your sisters by fosterage;" and the Prophet has also declared, "Every thing is prohibited by reason of fosterage which is so by reason of kindred."—Hidáyah, vol. i, page 78.

A general *Principle.*

CXCVI. The general principle with regard to the joining of women is, that it is not lawful to join together any two women, who, if we suppose either of them to be male, could not lawfully intermarry,

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cxcvi. It is not lawful for a man to marry two women within such degree of affinity as would render marriage between them illegal, if one of them were a man, because this would occasion a confusion of kindred.—Hidáyah, vol. i, page 80.

by reason of consanguinity or fosterage.*—Fatáwá Alamgírí, vol. i, page 391.—B. Dig., page 31. LECTURE IX.

Hence,—

CXCVII. It is not lawful to join a woman with her paternal or maternal aunt, by consanguinity or by fosterage.—*Ibid.* *Principle.*

CXCVIII. It is unlawful to cohabit with two sisters either in marriage or by right of property whether they be sisters by consanguinity or fosterage.—Fatáwá Alamgírí, vol. i, page 391.—B. Dig., page 31. *Principle.*

CXCIX. Should (two) sisters be married by separate contracts, the marriage of the last married is invalid, and it is incumbent on the husband to separate from her.†—Fatáwá Alamgírí, vol. i, page 392.—B. Dig., page 32. *Principle.*

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cxcvii. It is unlawful for a man to marry two women, of whom one is the aunt or niece of the other, the Prophet having declared a precept as recorded in the Záhir-ur-Rawáyit.—Hidáyah, vol. i, page 80.

cxcviii. It is not lawful to marry and cohabit with two women being sisters; neither it is lawful for a man to cohabit with two sisters in virtue of a right of possession (as being his slaves); because the Almighty has declared that such cohabitation with sisters is unlawful.—Hidáyah, vol. i, page 78.

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* Nor is it lawful for a man to be married at the same time to any two women who stand in such a degree of relation to each other as that if one of them had been a male they could not have intermarried.—Macn. M. L., Chap. VIII, Princ. 10.

But it is lawful to join a woman with her husband's daughter. And in like manner a woman and her female slave may be joined together; for the unlawfulness of marriage in such a case is neither by reason of consanguinity nor fosterage.—Fatáwá Alamgírí, vol. i, page 391.—B. Dig., page 31.

† This doubtless supposes a case where a man contracted in marriage through the agency of others empowered by him for that purpose, (as shall be shown in an ensuing Chapter,) and who may engage in the contract without his immediate knowledge.—Hidáyah, vol. i, page 79, *Note.*

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If a man happen to marry two sisters by two contracts,* and it is not known with respect to which (of them) marriage first took place, a separation from both the sisters must ensue; because it is evident that his marriage with *one* of the *two* is illegal, but it is impossible to ascertain with which, by reason of ignorance of priority; nor is it conceivable that a judgment should be pronounced legalizing the marriage of either, unspecified, since the marriage of both remaining unascertained, a rule to make the same valid would be illegal.—Hidáyah, vol. i, page 79.

Principle. CC. If a man repudiate his wife either by complete or revocable divorce, it is not lawful for him to marry her sister until the expiration of her *iddat*.—Hidáyah, vol. i, page 83.

Principle. CCI. The rules above mentioned with regard to two sisters equally apply to all other near relatives who cannot be lawfully joined together in connection with a man.—Fatáwá Alamgírí, vol. i, page 392.—B. Dig., page 32.

Principle. CCII. It is unlawful for a man to marry a free woman whom he has repudiated three times, nor a slave whom he has repudiated twice, till another husband has consummated with her. And as it is not lawful to marry her, so neither is it lawful for him to have connection with her by virtue of a right of property.—Fatáwá Alamgírí, vol. i, page 398.—B. Dig., pages 43 & 44.

And if a man should marry a slave, repudiate her twice, and then purchase and emancipate her, still it would not be lawful for him to marry her again till another had married and consummated with her, and then repudiated her, and her *iddat* had expired.—*Ibid.*

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* If the Judge be aware of the facts, he is bound to make the separation, and if he do so, before consummation, none of the legal effects of marriage is inferred, but if not till after consummation, the woman is entitled to dower.—Fatáwá Alamgírí, vol. i, p. 392.—B. Dig., p. 22.

CCIII. A master may not marry his (own*) slave, nor a mistress her bondsman.—Hidáyah, vol. i, page 84. LECTURE IX. *Principle.*

Because marriage was instituted with a view that the fruit might belong equally to the father and mother, and mastership and servitude are contradictory to each other; wherefore it is not admissible that offspring should thus be divided between the master and slave.—Hidáyah, page 84. Reason.

CCIV. The marriage of a female slave upon a free woman or together with her, is not lawful.—Fatáwá Alamgírí, vol. i, page 394.—B. Dig., page 36.

CCV. A man may lawfully marry a woman pregnant by whoredom, but he must not cohabit with her until after her delivery; if, however, the descent of the fœtus be known and established, the marriage is null according to all the doctors.—Hidáyah, page 89. *Principle.*

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cciii. It is not lawful for a woman to marry her slave, nor a slave of whom she is a part-owner; and since bondage is an objection to marriage, so a marriage is rendered void by one of the married parties becoming the owner or part-owner of the other. When a man marries his bondwoman or Mookatabah, or Moodubburah, or oom-i-wulud or a slave of whom he is part-owner, it is not a marriage. In like manner, it is not lawful for a man to marry a bondmaid in whom he has any right of property, as for instance, one acquired by his Mookatab, or by a slave licensed by him, and who is in debt. They say that in these times it is better that a man should marry his own slave, so that if she should happen to be free, his connection with her may be lawful by virtue of the marriage.—Fatáwá Alamgírí, vol. i, page 397.—B. Dig., page 42.

cciv. It is unlawful for a man, who has already married a free woman, to marry a slave (though she may be property of another person). The Prophet having issued a precept to this effect: "Do not marry a slave upon a free woman."†—Hidáyah, vol. i, pages 86, 87.

* See *ante*, page 304.

† A man may (however) marry a free woman upon a slave, the Prophet having so declared: moreover, a woman who is free is lawful under all circumstances, the principle of restriction before mentioned not operating with respect to such a woman.—Hidáyah, vol. i, page 87.

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Principle. CCVI. It is not lawful for a man to marry the wife, or the *mutaddah** of another, whether the *iddat* be on account of repudiation, death, or the consummation of an invalid or a semblable marriage. And if a man should marry the wife of another, not knowing her to be the wife of another, and should have connection with her, an *iddat* would be necessary; but if he knew her to be the wife of another, it would not be required, so that her husband would be under no prohibition from having matrimonial intercourse with her. It is lawful for the master of the *iddat*, that is, the person by connection with whom it is induced, to marry the *mutaddah** when there is no other impediment besides the *iddat*.—Fatáwá Alamgírí, vol. i, page 395.—B. Dig., page 37.

Principle. CCVII. It is not lawful for a man to marry the sister of his *mutaddah** (or repudiated wife who is still in her *iddat*), whether the *iddat* be for a revocable, or absolute, or triple repudiation, or for an invalid, or a dubious marriage. And as it is unlawful to marry the sister of a woman who is in her *iddat*, so it is unlawful to marry any other of her near relatives who could not be lawfully joined with her; or to marry four others besides her.—Fatáwá Alamgírí, page 393.—B. Dig., page 34.

Principle. CCVIII. It is unlawful to marry a pagan woman or an idolatress before she becomes a Musalmán.

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ccviii. It is unlawful to marry a Majúsí woman, God having said: "Ye may hold correspondence with Majúsís, the same as with Kitábís, but ye must not marry their daughters, nor partake of their sacrifices." It is unlawful to marry a pagan woman according to the words of the

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* '*Mutadda*' is the woman who is in the state of observing the *iddat*, or abstinence, upon being repudiated by her husband, or upon his death.

CCIX. It is not lawful for an apostate to marry a woman who has apostatized, nor a female Musalmán, nor an infidel by origin; and, in like manner, it is not lawful for a female apostate to marry with any one. The marriage of a Muslimah with an apostate, or with a kitábí, is unlawful.—Fatáwá Alamgírí, vol. i, page 397.—B. Dig., page 42. *Principle.*

CCX. It is unlawful for a free man to marry a fifth wife, during the existence of his four married wives. *Principle.*

CCXI. Marriage is obligatory on the person whose passion is ungovernable (*w*), it is a duty to him whose condition is moderate (*x*); but it is abominable to the person to whom there is an apprehension of its being a source of annoyance, or misery.—Durr-ul-Mukhtár, page 196. Marriage—obligatory, a duty, or a source of misery.

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Kurán: "Marry not a woman of the Polytheists until she embrace the faith."—Hidáyah, vol. i, pages 84, 85.

It is not lawful to marry fire-worshippers (Majúseahs), nor idolatresses, and in this respect there is no difference between free women and slaves. Among the worshippers of idols are included the worshipper of the Sun and Stars and images which they hold in reverence, and persons of every creed by belief in which one is deemed an infidel (Káfir).—Fatáwá Alamgírí, vol. i, page 396.—B. Dig., page 40.

ccx. When a free man has married five wives in succession, the marriage of the four first is lawful, but the marriage of the fifth is unlawful; and if he marry five in one contract, the marriage of the whole is vitiated.—Fatáwá Alamgírí, vol. i, page 391.—B. Dig., page 31.

ccxi. Marriage is a duty for the person whose constitution is moderate, but obligatory on him or her whose passion is immoderate or ungovernable, while it is abominable for the person to whom there is an apprehension of its being a source of annoyance or bringing on misery.*—Fatáwá Alamgírí, vol. i, page 377.

* Mr. Baillie appears to have omitted to translate this portion of the Fatáwá Alamgírí.

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(*w.*) 'Whose passion is ungovernable,'—that is, whose passion is so immoderate that, if he did not marry, he would be sure to commit adultery or fornication. But even in such state, if the man is unable to pay the dower, or support his wife, he will not commit a sin if he does not marry.—Durr-ul-Mukhtár, page 196.

Explanation.

(*x.*) 'Whose condition is moderate,'—that is, who is able to cohabit with a woman, to pay dower, and support (his wife). Being in such state, if he fail to marry, he will commit a sin;—on the other hand, if he does (marry), with the object of begetting children and not committing adultery or fornication, he will merit reward in the after life.—*Ibid.*

Principle. CCXII. A free man is allowed to have up to four wives, and no more while all four wives are living.*

Principle. CCXIII. If a man having four wives repudiate one of them, still it is unlawful for him to marry any other woman during the term of that wife's *iddat* or probation.—*Vide* Shah-ul-vikáyah, vol. ii, p. 331.

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ccii, ccxiii. It is lawful for a free man† to marry four wives, whether free or slaves; but it is not lawful for him to marry more than four, because God has commanded in the *Kurán*, saying: "Ye may marry whatsoever women are agreeable to you, two, three, or four," and the numbers being thus expressly mentioned, any beyond what is there specified would be unlawful.—Hidáyah, vol. i, page 88.

It is not lawful for any man to have more than four wives at the same time, and it is not lawful for a slave to marry more than two. A free man may marry four women whether they be slave or free. When a freeman has married five wives in succession, the marriage of the four first is lawful, but the marriage of the fifth is unlawful, and if he marry five in one contract, the marriage of the whole is vitiated.—Fatáwá Alamgírí, vol. i, page 391.—B. Dig., page 31.

* A free man may have four wives, but a slave can have two only. Macn. M. L., Chap. VII, Princ. 8.

† It is unlawful for a man who is a slave to marry more than two women Hidáyah, vol. i, page 88.

CCXIV. Among the Sunnís, the marriage is permanently contracted;* such marriages as *mutah* or usufructuary, and *mawakkah* or temporary, and the like, not being allowed by *their* law (*y*). *Principle.*

(*y.*) A 'nikáh-i-mutat (mutah)', or usufructuary marriage, is bátil or void, and not susceptible of repudiation. This is a *mutat* when a man says to a woman free from any cause of prohibition, "I will take the enjoyment of you for such a time," as ten days for instance, or "for days," or "give me the enjoyment of your person for days," or "ten days," or without any mention of days "for so much."—Fatáwá Alamgírí, vol. i, page 398.—B. Dig., page 18.

CCXV. The *mawakkat* or *mawakkah* (temporary marriage) is void, and it makes no difference whether the time be long or short, according to the most valid opinions, nor whether it be known or unknown (*z*).†—Fatáwá Alamgírí, vol. i, page 398.—B. Dig., page 18. *Principle.*

(*z.*) A 'nikáh-i-mutah,' or usufructuary marriage, where a man says to a woman, "I will take the use of you for such a time for so much," is void, all the Companions having agreed in the illegality of it.—Hidáyah, vol. i, page 91.

(*z.*) A 'nikáh-i-mawakkat,' or temporary marriage—where a man marries a woman under an engagement of ten days, (for instance,) in the presence of two witnesses,—is null. The argument of our doctors is, that a temporary marriage is of the same nature with a usufructuary marriage; and in all contracts, regard is had to the sense rather than to the letter, wherefore a temporary marriage is null as well as a usufructuary marriage, whether the period specified be short or long; because the principle on which a contract of marriage falls under the description of *Mutah*, or usufructuary, is its containing a specification of time;

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* Upon the provision of a support to the wife depends the *permanency* of the matrimonial connection.—Hidáyah, vol. i, page 113.

† The reason assigned for this is, that it can be for no other purpose than mere enjoyment, and therefore falls within the prohibition of *mutah* marriages, from which they differ only in the words of constitution.—Kifáyah, vol. ii, page 30.—B. Dig., page 18.

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and the same is found in a Nikkah-i-mawakkat or temporary marriage.—Hidáyah, vol. i, page 92.

Principle. CCXVI. Besides the formal marriage already described, marriage between a man and woman may be presumed from their continually living together and treating each other as husband and wife (such as by kissing, embracing, and so forth) without any direct proof of the formality or ceremony of marriage; provided the connection were not incestuous or such as marriage ought not to be presumed.* (See *ante*, pages 121 & 126; see also Parentage.)

Principle. CCXVII. It is laudable or proper to make a publicity of marriage, and to read the *khutbah* before the contract takes place, and it is proper that the contract be caused to be entered into by a sensible man in a *masjid* on a Friday in the presence of competent witnesses, and that the bridegroom should once see the bride previous to the marriage.—Durr-ul-Mukhtár, page 196.

The *tahmíd*† should accompany or precede the declaration as well as the acceptance; that is, the

ANNOTATIONS.

ccxvi. When a person has seen a man and woman dwelling in the same house (bayit), and behaving familiarly with each other in the manner of married persons, it is lawful for him to testify that she is his wife,—in the same way as when he has seen a specific thing in the hands of another.—Fatáwá Alamgírí.—B. Dig., page 421.

The person who has seen a man and woman dwelling in the same house (or room), and their treatment to each other is that of a husband and wife, (such as embracing and kissing each other), should testify before the Kází (Judge) that the woman is the wife of the man.—Jámi-ur-Ramúz, vol. iv, page 596.

* Marriage will be presumed in the case of proved continual cohabitation, without the testimony of witnesses; but the presence of witnesses is nevertheless requisite at nuptials.—Macn. M. L., Chap. VII, Princ. 13.

† Thanking God, saying—"God be praised," and so forth.

contracting party* should say—"Praise be to God, and blessing on the Prophet of God! I have married to you my daughter (named) such and such;" and the bridegroom should say,—"Praise be to God, and blessing on the Prophet of God! I have accepted marrying her upon this dower." It is also laudable to read the *tahmíd* before the reading of the *Khutbah*.†—Yahiyá-ul-Ulúm, Lucknow Edition, vol. ii, page 18.

The legal effects of marriage are as follow:—

Principle.

Effects of marriage.

CCXVIII. It legalizes the mutual enjoyment of the parties in a manner permitted by law, or according to nature. It subjects the wife to the power of restraint; that is, places her in such a condition that she may be prevented from going out and showing herself in public.‡ It imposes on the husband the obligation of *mahr* or dower, and of maintaining and clothing his wife. It establishes on both sides the prohibition of affinity and rights of inheritance. It obliges the husband to be just between his wives, and to have a due regard to their respective rights; while it imposes on them the duty of obedience when called to his bed, and confers on him the power of correction when they are disobedient or rebellious. It enjoins on him the propriety of associating familiarly with them with courtesy and kindness.—Fatáwá Alamgírí, vol. i, page 381.—B. Dig., page 13.

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* A father, or any other relation, as the case may be.

† It is stated in the Madárij-un-Nabúat, that the Prophet himself read the Khutbah on the marriage of his daughter Fátimah to Alí. Hence the reading of Khutbah in marriages may be said to be a *Sunnat*.

‡ A husband is at liberty to prevent his wife's parents, or other relations, or her children by a former marriage, from coming in to her, as her apartment or habitation is his property, which he may lawfully prevent any person from entering; but he cannot prohibit them from seeing and conversing with her, whenever they please.—Hidáyah, vol. i, page 402.

LECTURE X.

ON GUARDIANSHIP AND AGENCY IN MARRIAGE.

CCXIX. An infant is incompetent to marry without the consent of his or her guardian, but can do so with their consent or permission (*a*). The marriage contracted by a discreet minor, becomes, however, valid, upon its being ratified by his guardian (*b*).*—*Vide* Minority.

(*a.*) The marriage of a free and adult woman (contracted) without (the interference of) a guardian is valid, even though the match be unequal, and though the guardian may make an objection with respect to the latter. By the mention of 'a free and adult woman,' it is intended that marriages of minors, lunatics, and slaves are not valid; for, it is agreed by all, that guardians are necessary for the validity of their marriages.—*Sharh-ul-vikáyah* with Chalpí, vol. ii, page 332.

(*a.*) When a young girl contracts herself in marriage, and her brother being the guardian allows the marriage, it is lawful, but she is at liberty to rescind it on arriving at maturity.—Fatáwá Alamgírí, vol. i, p. 403.—B. Dig., p. 51.

(*b.*) The marriage contracted by a boy of understanding is valid though dependent for its operation on the consent of his guardian.—Fatáwá Alamgírí, vol. i, page 377.—B. Dig., pages 4 & 5.

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* A female not having attained the age of puberty, cannot contract herself in marriage without the consent of her guardians, and the validity of the contract depends upon such consent.—Macn. M. L., Chap. VII, Princ. 16.

The validity of marriages contracted by discreet minors,* or slaves, is suspensive on the consent of their guardians or masters.—*Ibid*, Princ, 3.

CCXX. The marriage of a minor, male or female, can be contracted by a guardian even against his or her will (*c*), though the minor, immediately upon attaining majority, have the option of confirming or cancelling the marriage (*d*), except in the case of its being contracted by a father or paternal grandfather*(*e*). *Principle.*

(*c.*) The guardians of a boy and girl may marry them to each other against their will, whether the girl be a virgin or a *sayyibah*, that is enjoyed.—Fatáwá Alamgírí, vol. i, page 402.—B. Dig., page 50.

(*c.*) The marriage of a boy or girl under age by authority of guardians is lawful, whether she be a virgin or not.—Hidáyah, vol. i, page 102.

(*d.*) When the Judge or the Imám contracts one in marriage, the option is established. This is sound, and the *fatwá* (decision) accords with it.—Fatáwá Alamgírí, vol. i, page 402.—B. Dig., pages 50 & 51.

(*d.*) When a woman perceives that her courses have come on, it would be well to exercise her option immediately on seeing the blood, and when she observes it at night, she is to say, "I have cancelled the marriage," and take witnesses when she rises in the morning, saying, "Surely I have now seen the blood, and have cancelled."—Fatáwá Alamgírí, vol. i, page 403.—B. Dig., page 52.

(*d, e.*) Where minors are contracted in marriage by a father or grandfather, they have no option on arriving at puberty, but when contracted by any other than a father or grandfather, they have an option on arriving at puberty, and may either abide by the marriage or cancel it.—Fatáwá Alamgírí, vol. i, page 402.—B. Dig., page 50.

* A contract entered into by a father or grandfather on behalf of an infant is valid and binding, and the infant has not the option of annulling it on attaining maturity; but if entered into by any other guardian, the infant so contracted may dissolve the marriage on coming of age, provided that such delay does not take place as may be construed into acquiescence.—Macn. M. L., Chap. VII, Princ. 18.

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(*d, e.*) But if the contract should have been executed by the authority of others than their parents, each is respectively at liberty, after they become of age, to choose whether the marriage shall be confirmed or annulled.—Hidáyah, vol. i, page 103.

(*d, e.*) If a man should marry his young child to one who is not an equal, as, for instance, to a slave, whether the child be a son or daughter; or should marry the child at an improper dower, as, for instance, if the child be a daughter, at less than the dower suitable to one of her condition, or if the child be a son at a dower in excess of what is proper to the condition of his wife, the marriage is lawful according to Abú Hanífah. But according to the other two, if the deficiency or excess be very glaring, it is not lawful. The doctrine of Abú Hanífah, however, in the matter, is the more sound. Upon this point they were all agreed, that it is only a father or grandfather who can lawfully enter into such a contract, and that a Judge cannot. The difference between them has reference only to a case where it is not known that the father acted carelessly or wickedly in the matter; but where this is known, the marriage is void according to all their opinions; and in like manner, they are agreed that if he were dumb at the time of contracting his child in mariage, the contract would not be lawful. When the excess or deficiency in the dower is within reasonable bounds, the marriage is also lawful according to general agreement. And it would be so whoever the guardian might be who made the contract, whether a father, grandfather, or any other.—Fatáwá Alamgírí, vol. i, page 412.—B. Dig., pages 73 & 74.

(*e.*) If the marriage of infants be contracted by the fathers or grandfathers, no option after puberty remains to them, because the determination of parents in this matter cannot be suspected to originate in sinister motives, as their affection for their offspring is undoubted; wherefore the marriage is binding upon the parties, the same as if they had themselves entered into it after maturity.—Hidáyah, vol. i, page 102.

Principle. CCXXI. If a virgin, when arrived at puberty, remains silent, or smiles, or laughs, or weeps with

effusion of tears unaccompanied by any audible sound, upon being informed that she has been contracted in marriage by her guardian, such an intimation from her is held to be equal to her consent or ratification (*f*).

(*f*.) If a female thus contracted in marriage during infancy, be of age when the marriage is first mentioned to her, and she upon that occasion remain silent, her silence is to be construed into consent; but if she continue ignorant of the contract, her right of option is still reserved until such time as she be informed of it, and remain silent as above.—Hidáyah, vol. i, page 104.

The option of maturity of a virgin is not protracted to the end of the assembly.*—Hidáyah, vol. i, page 105.

(*f*.) The mere silence when the woman is a virgin is sufficient to extinguish this option upon her part, and is not extended to the termination of the meeting; so that if a woman, being a virgin, should arrive at puberty, and remain silent, her option would be at an end.—Fatáwá Alamgírí, vol. i, page 403.—B. Dig., page 51.

(*f*.) When a virgin laughs on being consulted, or after receiving information that she has been contracted, that is assent on the authority of Kadúrí, and the Shaikh-ul-Islám, unless the laugh be in jest or sneeringly, when it would not be consent: and the fatwá accords with this distinction. If she smile, that is consent according to Halwáí. There is a difference of opinion with regard to weeping; but the correct distinction is that, if the weeping be with effusion of tears and unaccompanied by any audible sound, it indicates consent, while if accompanied by cries and sobs, it is not consent. This is most proper, and the fatwá accords with it.—Fatáwá Alamgírí, vol. i, page 405.—B. Dig., page 55.

But if she were a *sayyibah*† at the time of marriage, or if then a virgin, and her husband had directed her to be

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* Arab. '*maj'is*' meaning the place or company in which she may happen to be at the time of her attaining maturity.

† See *ante*, pages 298 & 299.

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conducted to his house, and she had arrived at maturity while living with him, her option would not be cancelled by silence, nor even by her rising from the meeting; but it would be cancelled by her assenting explicitly to the marriage, or doing anything from which her assent might be clearly inferred;—for instance, permitting connection with her, or asking maintenance, or the like.—Fatáwá Alamgírí, vol. i, page 403.—B. Dig., page 51.

Principle. CCXXII. The option of a man to dissolve his marriage contracted during his infancy is not cancelled by silence or the like, but it continues until he expresses his approbation by word or deed (*g*).

(*f*, *g*.) The right of option in a virgin after maturity is done away by her silence; but the right of option of a man is not done away until he acquiesce or express approbation by word or by deed: such as presenting her dower, cohabiting with her, and so forth.—Hidáyah, vol. i, pages 104 & 105.

(*g*.) The option of a boy is not cancelled until he say, "I have consented," or something proceeds from him from which his consent may be inferred; and rising from the meeting does not terminate the option of a boy, but it is cancelled by acquiescence.—Fatáwá Alamgírí, vol. i, page 403.—B. Dig., page 52.

Separation under the option of puberty is not a repudiation, because it is a separation in the cause of which both the husband and wife participate.—Fatáwá Alamgírí, page 404.—B. Dig., page 53.—*Vide* Hidáyah, vol. i, page 106.

Principle. CCXXIII. For the complete dissolution of the matrimonial tie, it is necessary that a decree purporting the dissolution of the marriage (cancelled by one of the married couple upon coming of age) should be obtained from the (Kází or) Judge (*h*).

(*h*.) It is also to be remarked that, in dissolving the marriage, the decree of the Kází (Judge) is a necessary condition in case of option exerted after maturity.—Hidáyah, vol. i, page 103.

If a boy or girl should choose to be separated, after arriving at puberty, but the Judge has not yet made the

separation, when one of them dies, they have reciprocal rights of inheritance, and up to the actual separation between them by the Judge, the husband may lawfully have intercourse with his wife.—Fatáwá Alamgírí, vol. i, page 402.—B. Dig., page 50.

Principle.

CCXXIV. Lunatics also may be contracted in marriage by their guardian. The lunatics so married have, however, the option of rescinding the marriage on regaining sanity, provided it were contracted by a guardian other than their fathers or grandfathers (*i*).

(*i*.) Lunatics, whether male or female, and whether the madness be continued or with lucid intervals, are like a boy and girl, and their guardian may accordingly contract them in marriage when the madness is continued.—Fatáwá Alamgírí, vol. i, page 402.—B. Dig., page 50.

(*i*.) An insane woman contracted in marriage by any other than a father or grandfather, has an option on recovering her reason; but she has no such option when contracted by either a father or grandfather. And if contracted by her son, he is like her father, or even before him.—Fatáwá Alamgírí, vol. i, page 404.—B. Dig., page 53.

Principle.

CCXXV. As a free, sane and adult woman can validly contract herself in marriage without the permission or intervention of a guardian,* who, (be he her father, or even the Sultán himself) cannot, without her consent, or against her will, lawfully contract her in marriage though she be a virgin, much less a *sayyibah*,† the validity of her marriage when contracted by a person other than herself depends therefore solely upon her consent or ratification (*j*).

(*j*.) The marriage entered into by a free woman who is sane and adult, without a guardian, is quite operative according to Abú Hanífah and Abú Yusuf as stated in the

* A woman having attained the age of puberty may contract herself in marriage with whomsoever she pleases, and her guardian has not right to interfere if the match be equal.—Macn. M. L., Chap. VII, Princ. 14.

† See *ante*, pages 298 & 299.

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Záhir-ur-Rawáyit.—Fatáwá Alamgírí, vol. i., page 405.—B. Dig., page 54.

It is not lawful for a guardian to force into marriage an adult virgin against her consent.—Hidáyah, vol. i, page 96.

None, not even a father or the Sultán, can lawfully contract a woman in marriage, who is adult and of sound mind, without her own permission, whether she be a virgin or *sayyibah*. And if any one take upon himself to do so, the marriage is suspended upon her sanction; if assented to by her; it is lawful, if rejected, it is null.—Fatáwá Alamgírí, vol. i, page 405.—B. Dig., page 55.

The consent of a woman is also a condition when she has arrived at puberty, whether she be a virgin or a *sayyibah*,* that is, one who has had commerce with a man; so that, according to us, a woman cannot be compelled by her guardian to marry.—Fatáwá Alamgírí, vol. i, page 379.—B. Dig., page 10.

Upon her guardian's proposing to contract her in marriage, an adult virgin's smiling, laughing, or remaining silent, must be construed to be her consent, but a *sayyibah's** consent must be expressed by words (*k*).

(*k*.) Where a guardian, being the person empowered to engage in the contract, requires the consent of an adult virgin to a marriage, if she smile or remain silent, this is a compliance; because the Prophet has said: "A virgin must be consulted in everything, which regards herself; and if she be silent it signifies assent;" and also, because her assent is rather to be supposed, as she is ashamed to testify her desire; and laughter is a still more certain token of assent than silence: contrary to weeping, as this manifests abhorrence, since tears are most commonly the effect of grief, and not of joy, which is rarely the occasion of them, and therefore not to be regarded. Some have said that if her laughter be in the manner of jest or derision, it is not a compliance; nor is her weeping a disapproval, if it be not accompanied with noise or lamentation.—Hidáyah, vol. i, page 97.

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* See *ante*, pages 298 & 299.

If a guardian propose a marriage to a *sayyibah*, (or a woman with whom a man has had carnal connection), it is necessary that her compliance be particularly expressed by words, such as, "I consent to it," because the Prophet has said, "*sayyibahs* are to be consulted," and also because a *sayyibah*, having had connection with man, has not the same pretence to silence or shyness as a virgin, and consequently the silent signs before intimated are not sufficient indications of her assent to the proposed alliance.—Hidáyah, vol. i, page 98.

When a guardian asks permission of an adult virgin to contract her in marriage, and she is silent, silence is permission; so also, if after being contracted by her guardian, she gives herself up to her husband, or after being informed of her marriage, she asks for her dower, in either case this is acquiescence. If, when told by her guardian that he means to marry her to such an one for a thousand, she remains silent, and the guardian then contracts her, whereupon she says, "I am not content;" or if he should make the contract without consulting her, and then inform her of the fact, whereupon she is silent; in both cases silence is consent, unless there be a nearer guardian than the one who has made the contract, in which case silence would not be assent, and she would still have an option either to sanction or reject it.—Fatáwá Alamgírí, vol. i, page 405.—B. Dig., page 55.

When a *thayyibah* (or *sayyibah*) is asked for permission to contract her (in marriage), or when informed that she has been contracted, her consent must be verbally expressed. And as her consent is established by speech, for instance, when she says, "I have consented," or "accepted," or "approved," or the like; so, also, it is manifested by her asking for her dower or maintenance, or permitting matrimonial intercourse, or accepting congratulations, or laughing from satisfaction, not in jest. But if a *thayyibah* be contracted in marriage, and accept a present after the contracting, or partake of her husband's food, or serve him as before, this is not consent. But if he were to retire with her, and she consenting, would that amount to recognition of the marriage? There is no report, upon this point, but, in my opinion, it would be so.—Fatáwá Alamgírí, vol. i, page 408.—B. Dig., page 60.

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When a woman is consulted as to marriage, the name of the intended husband should be mentioned, so that he may be known. But if she should say, "I am content with whatever you do," after his mentioning to her that several persons have proposed for her, or if she should say, "Marry me to whomsoever you please," or the like, that would be a valid permission. It has been said, however, that mention should also be made of her dower, and this is the opinion of the moderns, and is stated in the Fattih Kadír to be most proper.—Fatáwá Alamgírí, vol. i, page 406.—B. Dig., page 56.

When a father consults his daughter before marriage, and says to her, "I am going to contract you in marriage," and does not mention the dower or the name of the husband, and she remains silent, silence is not consent in such a case, and she may afterwards repudiate the marriage; but if both husband and dower be mentioned, and she is silent, silence is consent in that case. If the husband alone is named without any mention of the dower, and she is silent, and her guardian thereupon gives her in marriage, here it is said that the marriage is operative, because her silence is consent to a marriage without any specification of dower, which evidently means a marriage at a muhr-i-mithl, or proper dower, and that is implied whenever the contract is made by words of gift. It would be otherwise were he to contract her at a specified dower, for she gave him no authority to fix the dower, and the contract would not be operative until subsequently approved by her. When the guardian contracts her without previously consulting her, and then informs her of the marriage after it has taken place, but without mention of either the husband's name or the amount of the dower, and she is silent, there is a difference of opinion as to the effect of the silence, but according to that which is most correct, it is not consent in such circumstances; while, if both husband and dower were mentioned, it would be consent; and if the husband alone be mentioned without the dower, then the case is to be determined in the same way as has been already explained, in the consultation before marriage. If the dower alone be mentioned without the name of the husband, and she remains silent, silence is not consent; whether she were consulted before the marriage or only informed of the contract after it took place.—*Ibid.*

If a guardian should contract his ward in her own presence, and she should remain silent, our doctors differ as to effect of silence in such circumstances, but the more correct opinion is that which holds it to be consent.—Fatáwá Alamgírí, vol. i, p. 407.—B. Dig., pages 56 and 57.

CCXXVI. The preferable guardians in marriage are the male residuaries in the same order as in the inheritance; next, the mother; then the distant kindred in the order of proximity (*l*). *Principle.*

(*l*.) The guardians in marriage are the agnates or residuaries according to the same order as in the inheritance and exclusion. By residuaries is meant the residuaries in themselves, that is, males related without the intervention of females;—next, the mother, then the distant kindred in the order of proximity;—then the successor by contract (mowlá-ul-mowálát);—then the Judge (Kází) empowered in this matter.—Sharh-ul-Vikáyah, pages 338 and 339.

Relations* stand in the same order in point of authority to contract minors in marriage as they do in point of inheritance, but this authority in the more distant relations is superseded by the existence of those of a nearer degree.†—Hamilton's Hidáyah, vol. i, page 102.

The guardianship in marriage, according to the saying of the Prophet, belongs, in the first place, to the *asabah*,* or agnates, in the order of inheritance, the more remote being excluded by the nearer.—Fatáwá Alamgírí, vol. i, page 399.—B. Dig., page 45.

The order or grade of the agnates is as follows:—

CCXXVII. The offspring how low soever;—then the root or ancestor how high soever;—then the nearest ancestor's descendant, namely, the brother, then his sons how low soever;—then the remoter ancestor's descendant, namely, paternal uncle, then his sons how low soever;—then the father's paternal uncle, then his sons how low *Principle.*

* The original of the word '*relations*' is '*asabah*,' which ought to have been rendered by agnates or residuaries.—See *ante*, page 116.

† This translation is not merely of the text of the Hidáyah, but also of the passage of the Ináyah added thereto.

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soever;—then the paternal grandfather's paternal uncle, then his sons in the order of proximity. The strength of consanguinity must, however, prevail, that is, those related by both parents have precedence of those who are related by the same father only.—Sharh-ul-Vikáyah, page 339.

Principle. CCXXVIII. All these guardians have the power of compulsion over a female or male during minority, and over insane persons though adult.—Fatáwá Alamgírí, vol. i, page 399.—B. Dig., page 46.

Principle. CCXXIX. When an insane person has a son, and a father or a grandfather, the son is entitled to be the insane's guardian in preference to the father or grandfather.

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ccxxvii. The nearest guardian of a woman is her son; then her son's son, how low soever; next, her father; then her grandfather, that is father's father, how high soever.—Fatáwá Alamgírí, vol. i, page 399.—B. Dig., page 45.

After the above persons comes the full-brother; then the half-brother by the father's side; then the son of the full-brother; then the son of the half-brother by the father's side, how low soever; then the full-uncle; then the half-uncle by the father's side; then the son of the full-uncle; then the son of the half-uncle by the father, and their descendants; then the father's full-paternal uncle; then his paternal half-uncle by the father's side; then the sons of both in the same order; then the grandfather's full-paternal uncle; then his paternal half-uncle by the father's side; and then the sons of both, in the same order; then a man more remote of the woman's *asabah*, and he is the son of a distant paternal uncle.—Fatáwá Alamgírí, vol. i, pp. 399, 400.—B. Dig., pages 45 & 46.

ccxxix. If a lunatic woman have two guardians, one her son, and the other her father, the authority of disposing of her in marriage rests with the former, and not with the latter, according to Abú Hanífah and Abú Yusuf.—Hidáyah, vol. i, page 109.

When an insane woman has a father, and a son, or a grandfather and a son, the guardianship belongs to the son according to Abú Hanífah and Abú Yusuf.—Fatáwá Alamgírí, vol. i, page 399.—B. Dig., page 45.

CCXXX. Failing *asabah*, every near uterine relative, who may inherit from a minor, whether a boy or a girl, has the power of giving him or her in marriage, according to Záhir-ur-Rawáyit, as from Abú Hanífah (*m*).—Fatáwá Alamgírí, vol. i, page 400.—B. Dig., page 46. *Principle.*

(*m.*) The nearest, according to Abú Hanífah, is the mother, then the daughter, then the son's daughter, then the daughter's daughter, then the daughter of the son's son, then the daughter of the daughter's daughter, then the full-sister, then the half-sister by the father's side, then the half-brother and sister by the mother, then their children. After the children of sisters come paternal aunts, then maternal uncles, then maternal aunts, then the daughters of maternal uncles, then the daughters of maternal aunts; and the false or maternal grandfather is preferred to the sister, according to Abú Hanífah.—*Ibid.*

CCXXXI. The Mowlá-ul-Mowálát (or successor by contract,*) is next; then the Sultán or ruler, and then the Judge,† as a person appointed by him. *Principle.*

ANNOTATIONS.

CCXXX. In defect of paternal relations, authority to contract marriage appertains to the maternal relations (if they be of the same

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* See *ante*, pages 91 & 92.

† The Judge has the power of contracting a person in marriage who requires a guardian, when it is within his commission and authority; but when it is not within his commission, he is not the guardian. If a Judge should contract a woman in marriage when he has no authority from the Sultán for that purpose, and should afterwards, upon receiving such authority, give his sanction to the marriage, it would be lawful, on a liberal construction of the law: and this is correct.—Fatáwá Alamgírí, vol. i, page 400.—B. Dig., page 47.

When the Judge marries a young girl to himself, it is a marriage without a guardian; for in his personal concerns he is a mere subject, and the guardianship devolves on the person above him, that is, the Ruler, who also is but a subject in his own matters. Nay, the Khuleefah himself is no more than a subject in things that regard himself.—*Ibid.*

It is lawful for the son of a paternal uncle to marry his uncle's daughter to himself. When the Judge marries a young girl to his own son, the transaction is not lawful, contrary to the case of all other guardians.—*Ibid.*

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Principle. CCXXXII. If a minor, male or female, be contracted in marriage by a more distant guardian, while a nearer is present and competent to the guardianship, the contract is dependent on the sanction of the nearer; but if the nearer be incompetent by reason of minority, or insanity, though of full age, the contract is lawful; and in like manner, if the nearer guardian be absent at such a distance as precludes him from acting, the marriage contracted by the more remote is also lawful.—Fatáwá Alamgírí, vol. i, page 401.—B. Dig., page 49.

Principle. CCXXXIII. When a guardian becomes permanently insane, his guardianship ceases; but if he be

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family or tribe,) such as the mother,* or the maternal uncle or aunt, and all others within the prohibited degrees, according to Abú Hanífah upon the principle of benevolence.—Hamilton's Hidáyah, vol. i, page 107.

ccxxxi. Where persons are destitute of any natural guardian, the authority of contracting them in marriage is vested in the Imám or the Kází, because the Prophet has, in his precepts, declared, "persons being destitute of guardians, have a guardian in the Sultán."†—Hidáyah, vol. i, page 108.

ccxxxii. If the parents, or other first natural guardians of an infant, should be removed to such a distance as is termed *ghíbat-ul-munkatat*, it is in that case lawful for the guardian next in degree to contract the infant in marriage.—Hidáyah, page 108.

By the absence termed *Ghíbat-ul-munkatat*, is to be understood the guardian being removed to a city out of the track of the caravans, or which is not visited by the caravan more than once in every year; some, however, have defined it to signify distance amounting to three days' journey.—Hidáyah, vol. i, page 109.

* Although the word "mother" is not to be found in the Hidáyah in Arabic, yet the insertion thereof in the above passage does not appear to be unauthorized; since in many books of authority the mother is recognized to be the guardian in marriage immediately after the male residuaries.

Where there is no paternal guardian, maternal kindred may dispose of an infant in marriage; and in default of maternal guardians, the Government may supply their place.—Macn. M. L., Chap. VII, Princ. 19.

† See note †, *ante*, p 331.

mad with lucid intervals, his guardianship does not cease, and his acts during a lucid interval have legal operation. According to one report, the Imám fixed continuance for a month as the criterion for determining the character of the madness, and decrees are given accordingly.—Fatáwá Alamgírí, vol. i, page 401.—B. Dig., page 48.

CCXXXIV. When a son has arrived at puberty, a lunatic with lucid intervals, or a confirmed madman, the father's guardianship over his person and property continues.—*Ibid.* *Principle.*

CCXXXV. When a father becomes a confirmed lunatic, or mad with lucid intervals, the guardianship is not established in his son, so far as relates to his property; but it is established in him for the purpose of contracting the father in marriage, according to Abú Hanífah and Abú Yusuf. And this is correct.—Fatáwá Alamgírí, vol. i, page 401. —B. Dig., page 49. *Principle.*

CCXXXVI. An executor has no authority to contract a boy or girl in marriage, whether he be appointed by the father or not, except when the executor happens to be the natural guardian, and then he has the power by virtue of his guardianship, not of his executorship.—Fatáwá Alamgírí, vol. i, page 400.—B. Dig., page 47. *Principle.*

CCXXXVII. A minor or an insane person has no power of guardianship, and an infidel cannot be guardian to a muslim, whether male or female; nor a muslim to an infidel, whether male or female. It is said, however, that it ought to have been added, 'unless the muslim be the master of an infidel bondwoman, or be the Sultán.' An infidel may be guardian to one like himself. But an apostate cannot be guardian to any one, whether a muslim or an infidel; nor even to an apostate like himself. Pro- *Principle.*

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fligacy is no impediment to guardianship.—Fatáwá Alamgírí vol. i, page 400.—B. Dig., pages 47 & 48.

Principle. CCXXXVIII. If a female on attaining puberty contracts herself in marriage without the consent of her guardian, and the match be unequal,* her guardian has a right to object with a view to set the marriage aside.†

Principle. CCXXXIX. To make a separation for this cause, that is, inequality, it must be done before the Judge; and, without cancellation by a Judge, the marriage between the parties is not cancelled. The separation, however, is not a repudiation; so that if the husband has not consummated with her, she is not entitled to any part of the dower. But if he have consummated, or if a valid and complete retirement has taken place, he is liable for the whole of the dower specified, and for maintenance during the *iddat*, the observance of an *iddat* being incumbent on the woman.—Fatáwá Alamgírí, vol. i, p. 412.—B. Dig., p. 67.

When a woman has married a man who is not her equal, and the Judge, after consummation, has decreed a separation between the parties at the suit of the guardian, awarding payment of the dower against the man, and the observance of an *iddat* upon the woman, and subsequently to all this the man marries her again during the *iddat*, without the consent of her guardian, and the Judge again separates them before a second consummation, the woman is entitled to a second full dower, and must observe another *iddat* according to Abú Hanífah.—Fatáwá Alamgírí, vol. i, page 412.—B. Dig., page 68.

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* See *ante*, pages 299 & 300.

† A woman, having attained the age of puberty, may contract herself in marriage with whomsoever she pleases; and her guardian has no right to interfere if the match be *equal*.—Macn. M. L., Chap. VII, Princ. 14.

If the match be unequal, the guardians have a right to interfere with a view to set it aside.—*Ibid*, Princ. 15.

But in both the preceding cases, the guardians should interfere before the birth of issue.—Macn. M. L., Chap. VII, Princ. 14 to 17.

According to some of the Learned, it is only the *muharam*, or relations within the prohibited degrees, that are entitled to raise the question before the Judge;* but according to others, there is no difference between *muharam* and other guardians in this respect; so that the son of a paternal uncle and the like are equally entitled to raise the question; and this opinion is sound. But the power does not belong to mere maternal relatives, and is confined exclusively to the *asabah*, or agnates.—Fatáwá Alamgírí, vol. i, p. 412. —B. Dig., page 68.

CCXL. The delay of a guardian to sue for a separation does not annul his right of cancellation, even though it were prolonged till the woman gives birth to a child. But after the woman has actually borne a child to her husband, the guardians have no longer the right to cancel the marriage.—*Ibid.* *Principle.*

CCXLI. When a woman has married herself to a man who is not her equal, and one of her guardians has given his consent, it is no longer in the power of that guardian, or of any other equal to or below him, to cancel the marriage; but one superior to him may still do so. The rule is the same when one of the guardians has contracted her with her consent.—Fatáwá Alamgírí, vol. i, page 412.—B. Dig., page 69. *Principle.*

CCXLII. If a woman should marry for less than her proper dower, the guardian may object till the full amount of the dower is made up, or he may separate her from her husband; and when the separation takes place before consummation, she is not entitled to any part of the dower; but if it *Principle.*

* When a woman has married herself to a man not her equal without the consent of her guardian, and the guardian takes possession of the dower and provides her *jihaz*, this amounts to consent and acquiescence upon his part; and if he were only to take possession of the dower without providing the *jihaz* though there is a difference of opinion on the point, yet, according to the sounder view, that would still be consent on his part, and acquiescence in the contract.—Fatáwá Alamgírí, vol. i, p. 412.—B. Dig., page 68.

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should take place after consummation, she would be entitled to the full amount specified. So also if one of the parties should die before a separation. It is to be observed that this separation can be effected only before a Judge, and that until the Judge has pronounced a decree for a separation, the case admits of repudiation in the ordinary form, or by *Zihar* or *I'lá*, and that the right of inheritance remains in full force.—Fatáwá Alamgírí, vol. i, page. 414.—B. Dig., pages 71 & 72.

Agency in marriage.

Agents in matrimony are persons employed and authorized by the parties concerned to enter into contracts of marriage on their behalf, and the power so delegated is termed '*vikát-ba-nikáh*'* (agency in marriage).

Principle.

CCXLIII. A marriage may be contracted by or through an agent or agents.†

Principle.

CCXLIV. A marriage agent may be validly appointed without witnesses; though the contract entered into or effected by or through him is required to be witnessed.

Principle.

CCXLV. When two agents are appointed by a man or woman to contract him or her in marriage, and one of the two enters into a contract, it is not lawful.—Fatáwá Alamgírí, vol. i, pag 417.—B. Dig., page 83.

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ccxliv. The appointment of an agent for marriage is valid without witnesses, though their presence is a necessary condition to the contract.—Fatáwá Alamgírí, vol. i, page 415.—B. Dig., page 76.

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* Hamilton's Hidáyah, vol. i, page 116.

† Proposal of marriage may be made by means of agency.—Macn. M. L., Chap. VII, Princ. 6.

CCXLVI. If an agent act in contravention of his instructions, the act is invalid if it is not approved by his principal, or if it is not for the better (*n*). *Principle.*

(*n*.) A man directs an agent to marry him to a white woman, and he marries him to one that is black, or *vice versâ*, the contract is not valid; but it should be valid if the direction were for a blind woman, and the agent should marry him to one having sight.* *Illustration.*

A man directs another to marry him to one woman, and he marries him to two women by one contract, the principal is not bound as to either. But if he should allow the marriage as to both or either, the marriage so allowed would become operative. And if there had been two distinct contracts, the first would be binding, and the second suspended on his sanction. If an agent be appointed to marry a man to a particular woman, and he marries him to that woman and another with her, the marriage is valid as to the former; and if the agent were appointed to marry him to two women in a contract, and he should marry him to only one, the marriage would be lawful.*

If a man commission another, as his agent, to procure him a wife, and the agent should contract him to two women, by one declaration,† his marriage is not valid with either, for, being unlawful with both, on account of its contradicting the tenor of the commission with which he was charged, and unestablished with either, on account of unspecified priority, a separation from both must necessarily ensue.—Hidáyah, vol. i, page 120.

CCXLVII. Unless especially empowered, an agent cannot marry his own principal to himself or herself, nor to any of his or her own relations (*o*). *Principle.*

(*o*.) If a woman give authority to a man to contract her in marriage with himself, and he accordingly execute the contract in the presence of two witnesses, it is lawful.—Hidáyah, vol. i, page 116.

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* Fatáwá Alamgíri, vol. i, pp. 416, 417.—B. Dig., pp. 78 & 79.

† That is to say, by one contract.

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(*o.*) A man appoints a woman his agent to contract him in marriage, and she does so to herself, this is not lawful.—Fatáwá Alamgírí, vol. i, p. 415.—B. Dig., page 76.

A woman appoints a man to marry her to himself, and he says, "I have married such an one to myself," the marriage is lawful, even though he should not add, "I have accepted."—*Ibid.*

A man directs another to contract him in marriage, and he does so to his own little daughter, or to the little daughter of his brother (he being her guardian), this is not lawful. So also with regard to any other for whom he has power to act without her authority. But if he should marry the man to his grown-up daughter with her own consent, though it is stated in the Asal that, according to Abú Hanífah, the marriage would not be lawful, unless assented to by the husband, yet in the opinion of the other two it would be lawful: and if the woman were the agent's grown-up sister, and he had married his principal to her with her own consent, the marriage would be lawful, without any difference of opinion.—Fatáwá Alamgírí, vol. i, page 415.—B. Dig., page 77.

When an agent on the part of a woman marries her to his own father or son, the marriage is not lawful according to Abú Hanífah. And if the son be a child, it is unlawful without any difference of opinion.—*Ibid.*

Principle. CCXLVIII. When a marriage agent on the part of a woman contracts her to a person who is not her equal, the marriage is unlawful* according to all opinion. But if the party be her equal, though blind or lame, or a boy, or lunatic, the marriage is lawful. So also even though he should be an eunuch or impotent.—*Ibid.*

Principle. CCXLIX. When a man who has already four wives, appoints an agent to marry him to a woman, the appointment is to be regarded as having reference

* See however *ante*, pages 299 & 300.

to a time when it can be lawfully exercised,—as for instance after he may absolutely repudiate one of his wives.*

CCL. When a woman, after appointing an agent to contract her in marriage, makes a contract for herself, this is a discharge of the agent from his office whether he be made aware of the fact or not. But when formally discharged, his functions do not cease till he becomes acquainted with the fact, and if he should exercise them in the meantime by contracting her in marriage, the contract would be lawful.* *Principle.*

CCLI. If the agent were appointed by a man, the appointment having reference to a particular woman, and the man should himself marry the mother or daughter of the woman, the agent would be discharged from his office.* *Principle.*

CCLII. A marriage agent cannot delegate his authority to another; but if he should do so, and the delegate should make a contract in the presence of the original agent, it would be lawful.* *Principle.*

CCLIII. When a woman has appointed a woman to marry her, and has said: "whatever thing you may do is lawful," the agent may lawfully appoint another to contract her in marriage, and if death were imminent, and he should bequeath the agency to another, and the second agent should contract her in marriage after the death of the first, the contract would be lawful.* *Principle.*

CCLIV. Subject to the approval of the marrying parties, a marriage contract may be entered into by a fazúlí or unauthorized person. The marriage so *Principle.*

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* Fatáwá Alamgírí, vol. i, pp. 420 & 421.—B. Dig., pp. 83 & 84.

LECTURE X.

contracted may be sanctioned or ratified by word, or by deed (*p*).

(*p*.) Every contract issuing from, or initiated by, a fazúlí, for which there is a person competent to accept it, whether the acceptor be another fazúlí, or an agent, or principal, is contracted subject to approval, and the other side of the contract may stand over for acceptance during the meeting and no longer.—Fatáwá Alamgírí, vol. i, page 421.—B. Dig., page 85.

Our authorities are agreed, that—*

Principle.

CCLV. One person can act in a marriage as agent for both parties, or as guardian for both parties, or as guardian on one side and principal on the other, or as agent one side and principal on the other, or guardian on one side and agent on the other.†

But can one person act on both sides as a fazúlí, that is, without having any authority, or as a guardian on one side and fazúlí on the other, or principal on one side and fazúlí on the other, or as agent on one side and fazúlí on the other, so as to make a contract that would be dependent on subsequent sanction? According to Abú Hanífah and Muhammad, this cannot be done.†

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* Say the Compilers of Fatáwá Alamgírí.

† Fatáwá Alamgírí, vol. i, p. 421.—B. Dig., p. 84.

LECTURE XI.

ON DOWER.

DOWER is considered by some lawyers to be an effect of the marriage contract, imposed on the husband by the law as a mark of respect for the subject of the contract,—the wife; while others consider that it is in exchange for the usufruct of the wife: in other words, a consideration for the carnal use of the woman and its payment is necessary, as upon the provision of a support to the wife depends the permanency of the matrimonial connection. Thus, it is indispensable *á fortiori*,* so much so, that if it were not mentioned in the marriage contract, it would be still incumbent on the husband, as the law will presume it by virtue of the contract itself, and award it upon demand being made by the wife. In such case, the amount of dower will be to the extent of the dowers of the women of her rank and of the ladies of her father's family. Special beauty or accomplishments may, however, be pleaded for recovering a larger award than the customary dower, where the amount of dower is not mentioned in the contract. There is no limit to the amount of dower—it may be to a very large amount considering the position and circumstance of the bridegroom, but its minimum is never less than ten *dirms*; so where it is fixed at a lesser amount, the law will augment it up to ten dirms. The dower need not invariably be in currency, or even in metal, every thing, except carrion, blood, wine and hog,† also the bridegroom's own labour if he is a free man, being held by the law to be a good dower. Preliminary Remarks.

Dower is generally divided into two parts, termed—*Muajjal* (prompt,) and *Mowajjal* (deferred). The *Muajjal*

* Hidáyah, vol. i, page 113.

† These are no property with the Muhammadans.

LECTURE XI.

portion is exigible on entering into the contract, while the *Mowajjal* part of the dower is payable upon dissolution of the contract. Although the first part is payable, and is sometimes paid, at the time the contract is entered into, yet it has been the general practice (at least in this country,) to leave it unpaid, and so like an on-demand obligation it remains due at all times—the wife's right to the same not being extinguished by lapse of time. The wife's (or her guardian's) object of leaving the exigible part of the dower unrealized, seems to be that there may always exist a valid guarantee for the good treatment to her by her husband. The women of the respectable classes reserve their right and power to demand their exigible dowers till such time as occasion should require the exercise thereof. The custom of fixing heavy dowers, generally beyond the husband's means, especially in India, seems to be based upon the intention of checking the husband from ill-treating his wife, and, above all, from his marrying another woman, as also from wrongfully or causelessly divorcing the former.

Dower defined.

Dower (*mahr**) is an effect of the marriage contract, and imposed by the law on the husband as a token of respect for its subject—the woman—as well as a consideration for the usufruct.†

"A marriage," says the author of the Hidáyah, "is valid, although no mention be made of the dower by the contracting parties, because the term *nikáh* (marriage), in its literal sense, signifies a contract of union, which is fully accomplished by the junction of a man and woman; moreover, the payment of dower is enjoined by the law, merely as a token of respect for its object (the woman), wherefore the mention of it is not absolutely essential to the validity of a marriage: and, for the same reason, a marriage is also valid, although the man were to engage in the contract on the special condition that there should be no dower."—Hidáyah, vol. i, page 122.

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* It is also known by 'Sadák, Nahláh, or, Ukr.'—*Vide* Ináyah, vol. ii, page 52.

† *Vide* Hidáyah, vol. ii, p. 58.—B. Dig., page 91.

Nevertheless,—

CCLVI. Dower is so necessary to the marriage, that if it was not mentioned in the contract, the law will presume it by virtue of the contract itself.* *Principle.*

CCLVII. Where marriage is contracted without specification of the kind or amount of dower, or without mentioning whether dower should or should not be given, or with the express condition of giving no dower, there, upon demand being made after consummation of the marriage, or after the husband's death, the dower, which is termed the '*mahr-i-misl*,' that is the dower like that of the woman's equals, should be awarded and paid.† *Principle.*

CCLVIII. The *mahr-i-misl*, or proper dower,‡ of woman is to be determined with reference to the family of her father, when on a footing of equality with her in age, beauty, city, understanding, religion and virginity (*a*). *Principle.*

ANNOTATIONS.

cclvi. Dower is a consideration for the carnal use of the woman, the payment of which is necessary of course; and upon the provision of a support to the wife depends the permanency of the matrimonial connection; and this, therefore, is indispensable *â fortiori*.—Hidáyah, vol. i, page 113.

cclvi & cclvii. The dower that is due by the contract itself is termed 'mahr-i-misl,' which means literally 'dower of the like,' or, 'dower of the woman's equals.'—Ináyah, vol. ii, page 52.—B. Dig., page 91.

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* Fatáwá Alamgírí, vol. i, page 428.—B. Dig., page 95 *et seq.*

† Where no amount of dower has been specified, the woman is entitled to receive a sum equal to the average rate of dower granted to the females of her father's family.—Macn. M. L., Chap. VII, Princ. 21.

‡ The learned Translator of the *Hidáyah* has rendered the term '*Mahr-i-Misl*' by 'proper dower,' and Mr. Baillie has adopted the same in his translation of the Fatáwá Alamgírí.

LECTURE XI.

(*a.*) In regulating the proper dower of a woman, attention must be paid to her equality with the women from whose dowers the rule is to be taken, in point of age, beauty, fortune, understanding, and virtue; because it varies according to any difference in all these circumstances; and, in like manner, it differs according to place of residence, or time, (that is to say, times of trouble and confusion, as opposed to times of tranquillity;)—and the Learned in the law have observed that equality is also to be regarded in point of virginity, because the dower is different according as the woman may be a virgin or otherwise.—Hidáyah vol. i, pages 148, 149.

The *mahr-i-misl*, or proper dower, of any woman is to be regulated, in its amount or value, by that of the dower of her paternal relations, such as her paternal sisters or aunts, or the daughters of her paternal uncles, and so forth, according to a precept of Ibnu Musúd,—"To the woman belongs such a dower as is usually assigned to her female paternal relatives:" moreover, men are accounted of the class of their paternal tribe, and the value of a thing cannot be estimated but by attending to the value set upon its class.—Hidáyah, vol. i, page 148.

A woman's proper dower is not to be estimated by the dower of her mother or her maternal aunt, where they are not descended of her father's family, on account of the precept of Ibnu Musúd already recorded: yet if her mother should be descended of her father's family, (being, for instance, the daughter of his paternal uncle,) in this case a judgment may be formed from her dower, as being descended from the family of the father.—*Ibid.*

Principle. CCLIX. *Mahr-i-misl*, or proper dower, is also ordained by the law for the women who are married in exchange for one and another (*b*).

ANNOTATIONS.

cclix. When one man gives his daughter or sister in marriage to another, on condition that the other will give him his daughter or sister in return, the right to the person of each woman being the dower of the other, the contracts are effected; but the condition is void, and each woman is entitled to her proper dower. This is what is termed a '*Shaghár* marriage.'—Ináyah, vol. ii, p. 63.—B. Dig., p. 94.

(*b.*) If a person contract his daughter or his sister in marriage to another, on the condition of the other bestowing a sister or daughter in marriage upon him, so as that each contract shall stand as a return for the other respectively, both the contracts are lawful. Our doctors reply, (to the arguments of Sháfií with respect to the above) that the contractor has named, as a dower, a thing incapable of being so, (since a woman's person, in the sense it here bears, is incapable of being the property of a woman;) but yet the contract holds good, and a Mahr-i-misl, or proper dower, remains due (to each of the women,) the same as where wine or a hog is assigned as a dower. — Hidáyah, vol. i, pages 130, 131.

CCLX. The minimum of dower is ten *dirms*,* but there is no limit to its maximum (*c*).† So if a dower was fixed to be less than ten *dirms*, the same should be raised to ten, the law not recognizing and allowing any dower amounting to a sum under ten *dirms*.

Principle.

(*c.*) The lowest amount of dower is ten *dirms*, coined or uncoined; so that the weight of ten in pieces is lawful, though their actual value should be less.—Fatáwá Alamgírí, vol. i, page 426.—B. Dig., page 92.

ANNOTATOINS.

cclx. There is no legal limit to dower; and dowers to very large amounts have been sustained by the Courts of Justice in India.

The late Sudder Dewanny Adawlut of Calcutta have, in the case of Gholam Hosain Alí *v.* Zainab Bìbí, recognized and upheld a dower of three hundred thousand gold mohurs, and as this amount was greater than the deceased's whole estate, and was, like any other debt, to be satisfied before the heirs could inherit, the result was that the plaintiff's claim to inherit as a son was dismissed.—*Vide* Select Reports, of the Sudder Dewanny Adawlut of Calcutta, vol. i, page 48 (New Ed., p. 63).

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* A silver coin generally in value, about two pence sterling.

† A necessary concommitant of a contract of marriage is dower, the maximum of which is not fixed, but the minimum is ten dirms, and it becomes due on the consummation of the marriage, (though it is usual to stipulate for delay as to the payment of a part,) or on the death of either party, or on divorce.—Macn. M. L., Chap. VII, Princ. 20.

LECTURE XI.

(*c.*) The smallest dower is ten *dirms*. Sháfií says, that whatever sum may be lawful as the price of a commodity in purchase or sale, is lawful as a dower, because the dower is the right of the woman, and consequently it must depend upon herself to determine the amount of it. The arguments of our doctors in this case are two-fold: first, a precept of the Prophet, which expressly declares "there is no dower under ten dirms;" secondly, the law enjoins a dower with a view to manifest respect for the wife, wherefore it must be fixed, in its smallest degree, at such a sum as may be respectable; and this is ten *dirms*, that being the lowest amount of a theft inducing the punishment of amputation of a limb, which shows that such sum is the least that can be regarded in an important or respectable light.—Hidáyah, vol. i, pages 122, 123.

If a man assign, as a dower, a sum under ten *dirms*, yet his wife shall receive the whole of ten dirms, according to our doctors.—Hidáyah, vol. i, page 123.

The general rule with regard to specifications of Dower is, that when they are vaild, the thing specified is obligatory on the parties; and nothing besides if it be the value of ten dirms or more; while, if it be less than ten dirms, the dower must be made up to that amount.—Fatáwá Alamgírí, vol. i, page 426.—B. Dig., page 93.

Principle. CCLXI. The dower need not be in any currency or even in metal: every thing that is *mál* or property, and has a value (*d*), as well as profits of lands, labour of slaves, and so forth, with the exception of carrion, blood, wine and hog, and the man's own labour if he is a free man* (*e*), are fit subjects of dower, and may be stipulated to be given as dower.

(*d.*) Anything that is *mál*, or property, and has value, is fit to be subject of dower. Profits (*munafá*) are also good

* Because carrion and blood are not recognized as *mál* (property), and wine and hog have no legal value among the Muhammadans. And a freeman's own labour will not be upheld by law as a good dower, though the service of his slave will.

for that purpose, with the exception of the man's own service, when he is a free man, which is not good as an assignment of dower, according to Abú Hanífah and Abú Yusuf. The objection does not apply to the service of his male or female slave, nor to his own service, if he is a slave; and the assignment would be good without any difference of opinion.—Fatáwá Alamgírí, vol. i, page 426.—B. Dig., page 93.

(*e.*) If a Musalmán marry a woman, agreeing to give her, as a dower, wine or a hog, the woman has her proper dower (mahr-i-misl,) because a condition of assenting to receive such articles is invalid; but as a contract of marriage is not rendered null by a nugatory condition being comprehended in it, it holds good, in this case, though the condition be null: contrary to a case of sale, which is rendered null by an invalid condition. The assignment of the dower in either of the articles aforesaid is disapproved, because what is named is not property with Musalmáns; and on this principle it is that a proper dower becomes due.—Hidáyah, vol. i, page 143.

If a Muslim should marry a Muslimah, and specify for her in the contract some things that are lawful with some that are unlawful, as, for instance, in addition to a valid dower, he should mention some *rutls* of wine, the former only would be the dower, while the latter would be thrown entirely out of account, as having no legal value for Muslims, and the woman would have no claim to a full proper dower.—B. Dig., page 103.

In like manner,—

Principle.

CCLXII. Instruction in religion, performance of pilgrimage, or anything that is no property, or has no existence at the time, is no dower; should any such thing be mentioned in the contract, the marriage shall not be invalid, but the woman shall be entitled to the mahr-i-misl, or proper dower (*f*).

(*f.*) If a man should marry a woman for teaching her the *Kurán*, or the *haj* (pilgrimage to Mecca,) or similar observances, the specification would not be valid, and she should be entitled to her proper dower.—Fatáwá Alamgírí, vol. i, page 426.—B. Dig., page 93.

When something is mentioned as dower which is not in existence at the time, as, for instance, the future produce of

LECTURE XI.

certain trees, or of certain land, or the gains of a slave, the assignment is bad, and the woman is entitled to her proper dower. So also when something is mentioned which is not at the time property in all respects, as, for instance, what may be in the wombs of his flocks, or of his female slave, at the time, the assignment is not valid, and the wife is entitled to her proper dower.—Fatáwá Alamgírí, vol. i, page 427.—B. Dig., page 94.

If a free man marry a woman, on the condition of serving her, in return, for a stated time, (a year, for instance,) or of teaching her the *Kurán*, yet her proper dower (mahr-i-misl) is incumbent upon him notwithstanding, according to Abú Hanífah and Abú Yusuf.—Hidáyah, vol. i, page 131.

Principle. CCLXIII. When other property is substituted for *dirms*, regard is to be had to its value at the time of the contract according to the Záhir-ur-Rawáyit (*g*).

(*g.*) If its value were ten dirms on the day of contract, but is less at the time of taking possession, the woman has no right to reject it, while, if its value were less at the former time, though equal to ten at the latter, she is entitled to the difference. If the value be reduced by the loss of part of the property before taking possession, she has an option, and may take what remains of it, or ten dirms instead.—Fatáwá Alamgírí, vol. i, page 426.—B. Dig., page 93.

Principle. CCLXIV. Property assigned as dower must, moreover, be specified and in the husband's posses-

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ANNOTATIONS.

cclxiv. A Kábín-námah* is invalid in respect to property not in the *possession* of the husband at the time of the execution of the deed—Noor Bukhsh Chowdhooree *v.* Mussummat Arif Chowdhooree. The 10th of April 1844.—Sel. S. D. A. Rep., vol. vii, p. 123.

Held that a Kábín-námah* is invalid if the property conveyed by it be not *specified*.—Kadir Dad Khan *v.* Noorun-nessa. The 17th of April 1844.—Sel. S. D. A Rep., vol. vii, p. 158.

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* A deed respecting marriage-portion or dower.

sion at the time of the assignment, which would otherwise be invalid. LECTURE XI.

CCLXV. If a man should marry a woman for a dower to be fixed by herself or by him, or by a stranger, the assignment would be defective. But if, when the dower is left at his own discretion, he should fix it at the proper dower or something more, and she would be entitled to the sum fixed; while, if he should fix it at anything below the proper dower, she would be entitled to the proper dower, unless satisfied to take the sum specified.* *Principle.*

CCLXVI. Again, where the dower is left at the discretion of the woman, and she fixes it at the proper dower, or something less, she is entitled to the dower she has fixed; while if it is more than the proper dower, the excess is not lawful, unless assented to by the husband. And the rule is the same when the dower is left to the discretion of a stranger. If he fixes it at the proper dower, it is obligatory on both the parties; while if he fixes it above or below the proper dower, it is dependent, in the former case, on the assent of the husband, and in the latter, on that of the wife.* *Principle.*

CCLXVII. During the subsistence of marriage, an addition may be made to the dower, already fixed, either by the husband, or by his guardian during minority, and it is binding on the husband (*h*). *Principle.*

(*h*.) An addition to the dower is valid during the subsistence of the marriage, according to our three masters. And if a man should make an addition to his wife's dower

ANNOTATIONS.

cclxvii. If a man make an addition to the dower in behalf of his wife subsequent to the contract, such addition is binding upon him.—Hidáyah, vol. i, page 126.

* Fatáwá Alamgírí, vol. i, page 427.—B. Dig., pages 94 & 95.

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after the contract, the addition is binding on him, that is, when the woman has accepted the addition; and it makes no difference whether the addition be of the same kind as the original dower or not; or whether it may be made by the husband or by his guardian. The addition is not a gift, as supposed by Zufr, requiring possession to render it complete, but an alteration of the terms of the contract in a non-essential matter within the power of the parties, and like an addition to the price in sale, becomes incorporated with the original dower. It, nevertheless, falls to the ground when the woman is repudiated before consummation. Thus, an addition to the dower is perfected in the same way as the original, that is, by one of three causes, *viz.*, consummation, valid retirement, or the death of one of the married parties; but if a separation of the parties should take place without the occurrence of one or other of these three causes, the addition is void, and it is only the original dower that is halved, according to Abú Hanífah and Muhammad.—Fatáwá Alamgírí, vol. i, page 441.—B. Dig., pages 111 & 112.

Principle. CCLXVIII. When a man has married two women on one dower of a thousand, it is divided rateably among them in proportion to their (mahr-i-misl) or proper dower (*i*).

(*i.*) And if both are repudiated before consummation, half of one thousand is to be divided between them in the same ratio. If only one of the women should accept the contract, the marriage would be lawful as to her, and the thousand be divisible in the same manner, so much of it as corresponds to her proper dower being the specified dower for her, and the share of the other reverting to the husband. But if the marriage should prove invalid as to one of them, the whole of the thousand would belong to the other, and if consummation should take place with her whose marriage is invalid, she would be entitled to her proper dower, according to Abú Hanífah; and this is correct.—Fatáwá Alamgírí, vol. i, page 438.—B. Dig., pages 108, 109.

If a man should marry a woman for one of his slaves, or shirts, or turbans, the assignment would be valid, and he would be liable for one of them of medium value.—*Ibid.*

CCLXIX. When a man has married a woman on a dower of something distinctly specified, and it happens to perish before delivery, or a third party establishes a right to it, she may have recourse to her husband for a similar of the thing, if it belonged to the class of similars, or otherwise for its value.* *Principle.*

CCLXX. Dower is usually divided into two parts: 1—Prompt (*muajjal*), which is payable immediately, and 2—Deferred (*mowajjal*), which is not payable until the husband's death, or dissolution of marriage (*j*). *Principle.*

Vide Select Reports of the Sudder Dewanny Adawlut of Calcutta, vol. i, page 278.

CCLXXI. The realization of the *muajjal* part, which is generally fixed to be half of the whole dower, is, however, purposely† postponed; and if this portion of the dower is postponed in the husband's lifetime, still the woman's right to claim it is not extinguished. *Principle.*

It has been determined by the Privy Council that, though a woman's dower should be payable on demand, she is not obliged to sue for it immediately, nor in the lifetime of her husband.‡—Moore's Indian Appeals, vol. vi, page 229.

CCLXXII. A woman may resist consummation until she be paid *in full* the prompt portion of her dower (*k*). *Principle.*

ANNOTATIONS.

cclxxii. A woman may refuse to admit her husband to carnal connection until she receive her dower of him, so as that her right may be maintained to the return, in the same manner as that of her husband to the object for which the return is given, as in sale.—Hidáyah, vol. i, page 150.

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* This follows the analogy of sale, where the thing sold is at the risk of the seller till delivery.

† *Vide* Preliminary Remarks, pages 341 & 342.

‡ It may, therefore, be inferred that the time for the limitation of a suit for even the exigible part of a woman's dower does not begin to run until the dissolution of the marriage.—B. Dig., page 92.

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(*k.*) A woman may refuse herself to her husband, as a means of obtaining payment of so much of her dower as is *muajjal*, or prompt; and in like manner, her husband cannot, until such payment has been made, lawfully prevent her from going out of doors, or taking a journey, or going on a voluntary pilgrimage.—Fatáwá Alamgírí, vol. i, page 447.—B. Dig., page 125.

Though the husband should give his wife the whole of her dower except *one dirm*, she may refuse herself to him, and he cannot demand back from her what she may have already received.—*Ibid.*

A woman is also at liberty to resist her husband carrying her upon a journey until she have received her dower of him for the same reason.—Hidáyah, vol. i, page 150.

A young girl, having been contracted in marriage, goes to her husband before possession has been taken of the *sadák*, or dower: in such circumstances, the person who had the power of keeping her in the first instance before the marriage, is entitled to take her back to his house, and refuse her to her husband until he pay the dower to whomsoever may be entitled to receive it.—Fatáwá Alamgírí, vol. i, page 448.—B. Dig., pages 125 & 126.

And when a paternal uncle has contracted his brother's young daughter in marriage at a specified dower, and has delivered her to her husband before possession has been taken of the whole dower, the surrender is invalid, and she is to be restored to her home.—*Ibid.*

Principle. CCLXXIII. Where a part of the dower is prompt, and part of it deferred, and the woman has obtained the prompt; or when, after the contract, she has allowed it to be deferred to a known or definite term, she has no right to deny herself.—Fatáwá Alamgírí, vol. i, p. 449.—B. Dig., page 128.

Principle. CCLXXIV. If the whole be *mowajjal*, or deferred, the woman is not at liberty to refuse the embraces

of her husband, as she has dropt her right by agreeing to make her dower *mowajjal*.—Hidáyah, vol. i, page 150. LECTURE XI.

CCLXXV. Dower is confirmed by one of three things,—consummation, a valid retirement, and the death of either husband or wife; and *that*, whether the dower be named, or be the proper dower (mahr-i-misl). *After this no portion thereof is dropped, except by relinquishment by the rightful party.**—Fatáwá Alamgírí, page 428.—B. Dig., page 96. *Principle.*

CCLXXVI. In the case of dower being named or mentioned in the contract, half of it becomes due to the wife upon her being divorced *before* consummation or valid retirement (*a*), while the whole thereof becomes receivable upon her being divorced *after* consummation or valid retirement (*b*), or on the death of her husband as well as of herself (*c*). *Principle.*

(*a.*) Half of it (that is half of the dower) named, becomes due upon divorce taking place *before* consummation or valid retirement.—Jámi-ur-Rawúz, vol. ii, page 261.

(*b, c.*) The dower named or mentioned (in the contract) is due upon divorce *after* consummation as well as upon the death of either party. And half of it (*i.e.*, the dower named) becomes due upon divorce *before* consummation or valid retirement.—Sharh-ul-Vikáyah, vol. ii, page 343.

(*c.*) If the dower is named, it becomes due upon the death of any of them two, that is husband and wife; because death is like consummation with respect to dower.—*Ibid.*

ANNOTATIONS.

cclxxiv. When the dower is *mowajjal*, or deferred, to a known or definite term, and the term has arrived, she cannot deny herself for the purpose of obtaining payment of her dower, according to the Principles of Abú Hanífah and Muhammad.—B. Dig., page 128.

* The portion in italics is omitted by Mr. Baillie.

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(*a.*) If the husband, in the case now stated, were to divorce his wife *before* consummation, or vaild retirement* [*khalout-i-sahíh*], she, in this case, receives half of her specified dower,—God having commanded, saying, "If ye divorce them before ye have touched them, and have already settled a dower on them, ye shall pay them one-half of what ye have settled."—Hidáyah, vol. i, page 124.

(*b.*) If a man retire with his wife, and there be no legal or natural obstruction to the commission of the carnal act, and he afterwards divorce her, the whole dower in this case goes to her.—*Ibid*, page 127.

(*b, c.*) If a person specify a dower of ten or more *dirms*, and should afterwards consummate his marriage, or be removed by death, his wife, in either case, has a claim to the whole of the dower specified, because, by consummation the delivery of the return for the dower, namely, the Buza, or woman's person, is established, and therein is confirmed the right to the consideration, namely, the dower; and on the other hand, by the decease of the husband, the marriage is rendered complete, and every thing becomes established and confirmed by its completion, and consequently is so with respect to all its effects.—Hidáyah, vol. i, pages 123 & 124.

But,—

Principle. CCLXXVII. In the case of the dower *not* being mentioned in the contract, or being stipulated *not* to be paid, the wife is entitled to only a present (*mutat*)†—if divorced *before* consummation or valid retirement,* and to the proper dower (*mahr-i-misl*) upon her being divorced *after* consummation or valid retirement, as well as at her own or her husband's death, either before or after consummation or valid retirement (*d*).

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* Valid retirement *solus cum solâ*, where there is no legal or natural impediment to the consummation of the carnal act. It is also translated by 'complete retirement.' *Vide post*, p. 357.

† A *mutat*, or present, consists of three articles of dress—a *kumees*, or shirt; a *mulhaffat*, or outer garment, and a *mikna*, or head-dress, of medium quality, neither very good nor very bad. This is according to their practice, but in ours regard is had to our own usage. And if the husband should

(*d.*) In the case of dower *not* being named, the wife is entitled only to a present (*mutat*), if divorced *before* consummation; and to the proper dower, if divorced after consummation. This (proper dower) is also due, if either of them die before (or after) consummation.—Jámi-ur-Ramúz, vol. ii, page 262.

Marriage is valid even though the dower be not mentioned or it be stipulated not to be paid. Proper dower (*mahr-i-misl*) is due in all these (circumstances) upon consummation or death; but a *mutat* (present), such as would not exceed half of the proper dower, nor be less than five (dirms), is receivable (by her) upon divorce *before* consummation or valid retirement.—Shárh-ul-Vikáyah, vol. ii, pages 343 & 344.

If a man marry a woman without specifying any dower, or on the express stipulation that she shall not have a dower, and he either have carnal connexion with her, or die, she is, in that case, entitled to her *mahr-i-misl*, or proper dower.—Hidáyah, vol. i, page 125.

When one of the parties to a marriage, in which there was no mention of dower, has died, the right to the full *mahr-i-mithl*, or proper dower, is perfected, whether the woman be free or a slave, without any difference of opinion.—B. Dig., page 102.

If a man marry a woman without any specification of dower, or on condition of there being no dower, and divorce her *before* carnal connexion, the woman, in this case, receives a *mutat*, or present;—God having commanded, saying, "give her a present, the rich according to his wealth, and the poor according to his poverty:"—Hidáyah, vol. i, page 125.

It is laudable to bestow a *mutat*, or present, upon every woman divorced by her husband, excepting two descriptions

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give her the value of the articles in *dirhms* or *dinárs*, she may be compelled to accept it. But it is not to exceed half the *mukr-i-mithl*, or dower of her equals, nor fall short of five dirhms. Regard is also to be had to the woman's condition, for the present comes into the place of the proper dower. If, then, she be of low degree, she is to have a *mutat*, or present, of *kirbas*, or linen; if of middle rank, one of *kuzz*, or spun silk; and if of high station, one of *abreshom*, or silk. But regard should be had to the man's condition, according to the Hidáyah and Kafee, while according to the other authorities the conditions of both should be taken into consideration and the Fatwá is said to be in accordance with this view.—B. Dig., page 97.

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of women, namely, one whose dower has been stipulated, and whose husband divorces her before consummation,—and one whose dower has not been stipulated, and who is also divorced before consummation; for in their behalf a present is not merely laudable, but incumbent.*—Hidáyah, vol. i, page 129.

And when none has been named in the contract, or he has married her with a condition that she shall have no dower, she is entitled to her proper dower if the marriage be consummated or one of the parties happens to die; and to a *mutat*, or present, if repudiation takes place before consummation or a valid retirement.—Fatáwá Alamgírí, vol. i, page 428.—B. Dig., page 96.

Principle. CCLXXVIII. If a man marry a woman without naming any dower, and the party should afterwards agree to a dower and specify its amount, such dower goes to the woman, if the husband either consummate the marriage or die; but if he divorce her before consummation, she receives only a present (*f*). Hidáyah, vol. i, page 126.

(*f*.) So also, when no dower has been specified in the contract, but the parties afterwards arrange it by mutual agreement, though she has a right to the whole if the marriage be consummated, or her husband happens to die, yet if she be repudiated before consummation, it is only a *mutat*, or present, that she is entitled to, and not half of the dower subsequently agreed upon.—Fatáwá Alamgírí, pages 427 & 428.—B. Dig., page 96.

Principle. CCLXXIX. When dower has been assigned by the Judge or by the husband *after* contract, and the husband repudiates his wife before consummation,

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* There are three kinds of *mutat*, or present:—1*st*—Incumbent, which is due to every woman repudiated before consummation, for whom no dower has been assigned; 2*nd*—Laudable, which is conferred on any woman repudiated after consummation; and 3*rd*—What is neither incumbent, nor laudable, which is applicable to women repudiated before consummation, to whom dower has been regularly assigned. So that it is laudable to confer a *mutat* on all repudiated women except the last, namely, those for whom dower has been assigned, and who are repudiated before consummation.—Fatáwá Alamgírí, vol. i, page 429.—B. Dig., page 98.

she is entitled only to a *mutat*, or present, instead of half of the specified dower according to Abú Hanífah and Muhammad.*

CCLXXX. It is only when the husband is himself the cause of the separation that he is liable for a *mutat*, or present (*g*).* *Principle.*

(*g*.) As for instance, when he repudiates his wife, or is separated from her by reason of *íla*, or *lián*, or *jabb*, or impotence, or for apostacy and rejection of Islám, or kissing his wife's mother or sister with desire. And he is not liable when the cause of separation is on the part of the wife, as for instance, when it is her apostacy and rejection of Islám, or when she kisses her husband's son with desire, or exercises an option of puberty, emancipation, or inequality.* *Example.*

CCLXXXI. In every case in which there is no liability for *mutat*, there is none for half the dower, if dower were specified; and in every case in which a contract requires the proper dower, a *mutat* is due if the wife is repudiated before consummation.* *Principle.*

CCLXXXII. There is no *mutat*, or present, for a woman whose husband has died leaving her surviving him, whether dower were assigned to her or not, and whether the marriage had or had not been consummated. And in like manner, in any case of invalid marriage, when a Judge separates the parties before consummation, or a valid retirement, or even after a valid retirement (*h*) when the husband denies consummation, there is no *mutat** or *mutah*.— *Principle.*

(*h*.) Retirement is valid or complete when the parties meet together in a place where there is nothing in deceney, law, or health to prevent their matrimonial intercourse.†

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* Fatáwá Alamgírí, vol. i, pages 428 & 429.—B. Dig., pages 96—98.

† If a man retire with his wife whilst one of them is sick, or fasting in the month of Rumzán, or in the Ibrám of a pilgrimage, whether obligatory or

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And retirement is invalid whenever there cannot be such intercourse.—Fatáwá Alamgírí, vol. i, page 429.—B. Dig., page 98.

Principle.

CCLXXXIII. When dower has once been perfected, it does not drop, though a separation should afterwards take place for a cause proceeding from the wife, as, for instance, by her apostatizing, or consenting to the son of her husband, after he had consummated or retired with her; but before dower is perfected, the whole *falls* by reason of any separation proceeding from the wife. If either of the parties die a natural death before consummation of marriage in which dower has been assigned, the right to it is perfected, without any difference of opinion whether the woman be free or a slave.*

Principle.

CCLXXXIV. So also when one of the parties has been slain, whether by a stranger or by the other of them; and in the case of the husband, though by his own act. When the wife commits suicide, there is no abatement to the husband from the dower, if she were free; nay, he is liable for the whole.*

Principle.

CCLXXXV. Dower, when confirmed,† is held to be a debt due by the husband, and is payable at any time since its confirmation, though not realizable, except the *muajjal* (prompt) part thereof, before the dissolution of the marriage, which takes place by divorce, separation, or by the death of either of the married couple.

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voluntary, or of a visitation at the shrine of the Prophet (termed an 'Amrit'), or whilst the woman is in her courses, that is not regarded as a khalwat-i-sahíh, or complete retirement, in so much that if the man were to divorce his wife after such retirement, the woman is entitled to her half dower only; because all the above circumstances are bars to the carnal act.—Hidáyah, vol. i, page 128.

* Fatáwá Alamgírí, vol. i, pages 428 & 431.—B. Dig., pages 196 & 101.

† *Vide* Principle cclxxv.

CCLXXXVI. The *muajjal* portion of dower is due immediately upon the marriage taking place, and is payable and realizable there and then, or at any time subsequent.* Lecture XI. — *Principle.*

CCLXXXVII. In the case of divorce *before* consummation, only half of the *mowajjal* (deferred) dower becomes payable and realizable, but no portion of the *mahr-i-misl*, or proper dower, is so, a present is, however, given to the wife. *Principle.*

CCLXXXVIII. When the parties have explained how much of the dower is to be *muajjal*, or prompt, that part of it is to be promptly paid. When nothing has been said on the subject, both the woman and the dower mentioned in the contract are to be taken into consideration, with the view of determining how much of such a dower should properly be prompt for such a woman, and so much is to be *muajjal*, or prompt, accordingly, without any reference to the proportion of a fourth or a fifth; but what is customary must also be taken into consideration. Where, however, it has been stipulated that the whole is to be *muajjal*, or prompt, the whole is to be so, to the rejection of custom altogether.†—Fatáwá Alamgírí, vol. i, page 448.—B. Dig., pages 126 and 127. *Principle.*

CCLXXXIX. Dower is a debt like all (other) debts, and (its payment) is preferred to the (distri- *Principle.*

Annotations.

cclxxxix. Dower is a debt at the responsibility of the husband, and is confirmed by death, and is payable from his assets.—Durr-ul-Mukhtár.

* See *ante*, page 351.

† It has been decided by the late Sudder Dewanny Adawlut at Agra that a wife cannot claim the whole of her dower as exigible (or prompt), while her

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bution of) inheritance, and legacies. It prevents the distribution of the heritage among the heirs.—Fatáwá Kázíkhán.

Principle. CCXC. The dower remaining unpaid after it became due and realizable can be recovered not only by the wife herself, but also by her assignee, heir or representative (*i*).

(*i.*) When the woman dies, her dower devolves on her heirs, because dower is a debt like all (other) debts.—Khúlásat-ul-Fatáwá.

(*i.*) In the case of the death of husband and wife, it belongs to the heirs of the latter to take the dower out of the estate of the husband, where it has been specially named, but if it should not have been specified, they cannot claim anything whatever, according to Abú Hanífah. The two disciples maintain that the woman's heirs are entitled to her dower in either case,—that is to say, to the specified dower in the former case, or to the woman's proper dower in the latter.—Hidáyah, vol. i, page 155.

Principle. CCXCI. A woman, while in good health and of sound mind, may make a gift or sale to her husband,

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ANNOTATIONS.

cclxxix & ccxci. According to law,—the dower of the wife is a debt, and stands on an equal footing with the just claims of other creditors; either description of debt being entitled to prior satisfaction. The law, however, requires specification in all contracts of exchange; and this being indispensible, the deed of mutual gift, which is in this case destitute of it, is not valid, and binding.—Macn. Prec. M. L., Chap. II, Case 13.

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husband is alive, where no specific amount has been declared to be exigible. In such case one-third of the whole must be considered exigible (*muajjal*), and two-thirds not exigible (*mowajjal*), such two-thirds being only claimable on the death of the husband.—*Vide*, Reports N. W. P., vol. iii, page 185.—B. Dig., page 127, Note.

Sir William Macnaghten, however, says:—"Where it may not have been expressed whether the payment of the dower is to be prompt or deferred, it must be held that the whole is due on demand" (Macn. 56.)—But he does not state, nor does it appear, upon what authority the above is founded.

or to any other person, of a part or the whole of the dower she was entitled to (*i*).

(*i*.) If a woman exonerate her husband from any part, or even from the whole of her dower, it is approved; because, after the execution of the contract, it is her sole right, (as was already explained,) and the case supposes her dereliction of it to take place at a subsequent period.—Hidáyah, vol. i, page 127.

If a woman should allow an abatement from her dower, the abatement is valid. Her consent is necessary to the validity of an abatement; for, if made against her will, it is not valid. It is also necessary that she should not be sick of her death-illness at the time of giving her consent.—Fatáwá Alamgírí, vol. i, page 442.—B. Dig., page 112.

A woman may make a gift to her husband of whatever sadák, or dower, she is entitled to, whether he have consummated with her or not; and none of her guardians, not even a father, has any right to object. But a father cannot give away the dower of her daughter, according to all our learned men.—Fatáwá Alamgírí, vol. i, page 446.—B. Dig., page 119.

When the wife of a deceased person has given her dower to the deceased, the gift is lawful; but if she should give it while (herself) in the pangs of labour, and should then die, the gift would not be valid.* If she should give it to his heirs, the gift would be lawful; and if she give away her dower conditionally, and the condition is fulfilled, the gift is lawful: otherwise it reverts to the estate.†

CCXCII. When a woman has given the sadák, or dower, to a stranger, and empowered him to take possession of it, and he has done so, and her husband then repudiates her before consummation, he may have recourse to her for half of it. Things indeterminate and determinate are alike in this respect.† *Principle.*

* Except to the extent of one-third.
† Fatawá Alamgírí, vol. i, page 447.—B. Dig., pages 120 & 121.

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Principle. CCXCIII. When a woman has sold her dower to her husband, or given it to him for a consideration, and he then repudiates her (before consummation), he has a claim against her for half its like, or half its value, according as the dower belonged to the class of similars or dissimilars. And if she sell it before possession, she is liable for half its value on the day of sale; but if she first took possession, and then sold it, she is liable for its value on the day of taking possession (*j*).*

(*j*.) If a man marry a woman on a dower consisting of certain specified effects, and she make a gift of the same to him, either before or after seizin, and he afterwards divorce her before consummation, he, in this case, has no claim of resumption whatever upon the woman.—This proceeds upon a favorable construction.—Hidáyah, vol. i, page 136.

Principle. CCXCIV. The dower, like any other debt, may be made a consideration for a transfer of property by the husband to the wife.*

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Transfers of this kind are usually effected by writings termed the 'hibah-bil-iwaz,' or 'bayi-mukásah.'—See the Lectures on sale and gift.

Principle. CCXCV. When a man commits fornication with a woman and then marries her, while still on her person; he is liable for two dowers,—one the proper dower on account of fornication, and the other the dower which is named or appropriate to the marriage. And when a girl solicits a boy to her embraces, and her virginity is lost in consequence, he is liable for her dower; for even her order is not valid to the effect of cancelling her right, contrary to the case of an adult woman.*

* Fatáwá Alamgírí, vol. i, pp. 446, 447 & 458.—B. Dig., pp. 121, 122 & 138.

CCXCVI. If the *Walí* (guardian) of a woman become surety for her dower, it is approved, because he is competent to such responsibility, (that is, to take such obligation upon himself,) and he is surety in a thing which is a legal subject of bail, (namely, the dower,) since that is a debt, in which bail is approved : and the woman is afterwards at liberty to require her dower either of her husband or of her guardian, as in all other cases of bail: and if the guardian pay the dower, he shall take the same from the woman's husband, where he has become surety at his desire, as is the invariable rule in bail. The bail is in like manner approved; if the wife be an infant (*k*).—Hidáyah, vol. i, page 149.

Principle.

Of surety for dower.

(*k*.) When a person has married his daughter to a man, whether she be an infant, or an adult virgin, or insane, and has become surety on behalf of the man for the dower, the suretyship is valid, and the woman has her option of suing the husband or the guardian when she is legally competent to sue; whereupon the guardian, after he has paid, may have recourse against the husband if he became surety by his direction.—Fatáwá Alamgírí, vol. i, page 460.—B. Dig., page 140.

When a man has married his infant son to a woman, and become his surety for the dower, and the transaction has taken place while the father was in good health, the suretyship is valid if accepted by the woman; and if the father should pay the dower while in health, he has no right to reimbursement from the son, on a favourable construction of law, unless there was a condition in the original security that he should be entitled to such reimbursement. The woman, however, may claim the dower from the guardian (that is the father), but she is not entitled to claim it from her husband (the son) till he attains to puberty; and when he arrives at that state, she may demand it from either of them at her pleasure. When a son is adult, and his father, while in health, becomes surety for him, without his authority, and then dies, and the woman takes the dower from his estate, his heirs have no right of recourse against the son, according to general agreement. Insane persons are

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like minors in this respect. All this when the suretyship is effected in a state of health; but when it is given in a death-illness, it is void.—Fatáwá Alamgírí, vol. i, page 460.—B. Dig., page 140

Principle. CCXCVII. A woman is not entitled to any dower under an invalid marriage judicially dissolved before consummation; in case of consummation, however, she is entitled to her proper dower (mahr-i-misl), but if dower was already specified, and was less than the former, then she is not entitled to more than the specified dower (*l*).

(*l*.) If the Kází separate a man from his wife before cohabitation, on account of their marriage being invalid, the woman is not entitled to any part of the dower, because, where the marriage is invalid, no obligation with respect to dower is involved in the contract, as that, in such a case, is also null; nor is the dower held to be due on any other account than the fruition of the connubial enjoyment, which is not found in the present instance. In the same manner, no dower is due after khalwat-i-sahíh, or complete retirement, because, on account of the invalidity of the marriage, the law does not consider retirement as indicating the commission of the carnal act, and, consequently, it does not stand as such.—Hidáyah, vol. i, pages 145—147.

Principle. CCXCVIII. Right to dower is in danger of dropping altogether, by apostacy of the wife, or by her kissing her husband's son with desire; but this danger is removed by consummation, which is an actual delivery of the exchange for dower. Hence dower is said to be confirmed and binding, by comsummation, or by its substitution, a valid retirement, or by death, which by terminating the marriage, puts an end to all the contingencies to which it is exposed.—Ináyah vol. ii, page 55.—B. Dig., pages 91 & 92.

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ccxcvii. If a man engage with a woman in an invalid marriage, and have carnal connexion with her, she is in this case entitled to her proper dower; but she is not entitled to more than the specified dower.—Hidáyah, vol. i, page 146.

LECTURE XII.

ON FOSTERAGE AND NASAB,* OR PARENTAGE.

FOSTERAGE, with respect to the prohibitions occasioned by it, is of two kinds: 1*st*,—where a woman takes a strange child to nurse, by which all future matrimonial connection between that child and the woman, or her relations within the prohibited degrees, is rendered illegal; 2*nd*,—where a woman nurses two children, male and female, upon the same milk, which prohibits any future matrimonial connection between them,†—they being related to each other as brother and sister. Fosterage, different kinds of.

CCXCIX. Illegality is induced by sucking, whether it be little (*a*) or much, provided that it take place within the proper period (*b*).‡ *Principle.*

(*a.*) A little, however, must be understood as what is known to reach the stomach.‡

(*a.*) Prohibition is attached to fosterage, in whatever degree it be found within the usual period of infants subsisting at the breast. Our doctors support (this) their opinion by the authority of the sacred text, God saying, in the *Kurán*, "Your mothers, who have suckled you, are prohibited unto you;" and also upon a precept of the Prophet, that—"whatever is prohibited by consanguinity, is also prohibited by fosterage," where no distinction is made between a smaller (*b*) or a greater degree of it.—Hidáyah, vol. i, page 188.

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* "*Nasab*," the term is commonly restricted to the descent of a child from its father, but it is sometimes applied to descent from the mother, and is occasionally employed in a larger sense to embrace other relationships.—B. Dig., page 389, *Note*.

† Hidáyah, vol. ii, page 187, *Note*.

‡ Fatáwá Alamgírí, vol. i, page 483.—B. Dig., page 193.

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(*b.*) The period of fosterage is thirty months according to *Abú Hanífah.* The two disciples hold it to be two years, and the same is the opinion of *Sháfií.*—Hidáyah, page 188.

(*b.*) The period of sucking, according to a saying of *Abú Hanífah,* is thirty months, though the disciples have said that it does not extend beyond two years. Though a child has been weaned within the period, yet, if again put to the breast before its expiration, that would be sufficient to occasion the prohibition by fosterage, as the infant has been actually suckled within that period. This seems to be clear according to our doctrines, and the *Fatwá* is stated in the Yenábíah to be in accordance with it.*

Principle. CCC. All are agreed that the period of suckling, so as to establish a right to hire on the part of the nurse, is two years.*

Principle. CCCI. If a child continue to suck *after* the proper period of fosterage is elapsed, prohibition is not established. A child's forsaking the breast before the expiration of the period of fosterage is not regarded (*c.*)—Hidáyah, vol. i, page 190.

(*c.*) That is to say, if a child withhold from taking its milk before the period of fosterage has elapsed, and there be still milk in the mother's breast, and any other infant suck the milk before the expiration of that period, in this case prohibition by fosterage is established between those children.—Hidáyah, vol. i, pages 190, 191. Hence,—

Principle. CCCII. It is to be observed as a rule that—when a male and female infant suck from one breast, they are prohibited to each other in marriage, because they have one common mother.—Hidáyah, vol. i, page 193.

A general principle. CCCIII. Persons prohibited to each other in marriage by reason of consanguinity are also (with

* Fatáwa Alamgírí, vol. i, page 483.—B. Dig., page 193.

some exceptions*) prohibited by reason of fosterage.†

Consequently,—

CCCIV. It is not lawful for a man to marry the wife of his foster father, or of his foster son, (in the same manner as he is prohibited from marrying the wife of his natural father or son), because of the tradition before quoted.—Hidáyah, page 192. *Principle.*

CCCV. It is not lawful for a male to marry the husband's sister of the woman who has suckled him, as she is his paternal aunt by fosterage.—*Ibid*, page 193. *Principle.*

CCCVI. It is not lawful for a female to marry any of the sons of the woman who has suckled her, because they are her brothers, nor the sons of those sons, because they are her nephews.—*Ibid.* *Principle.*

CCCVII. To the suckling, both his foster parents and their ascendants and descendants, either by natural descent or fosterage, are all prohibited (*d*).‡ *Principle.*

(*d.*) So that if his nurse should have already borne, or should hereafter bear, a child to the same or to another man, whether before the nursing or after it, or should have nursed another infant; or if the man have a child by another woman, whether before this nursing or after it, or such woman should nurse another infant on *his* milk,

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cccciii. Whatever is prohibited by consanguinity is so likewise by fosterage, according to the saying of the Prophet (already quoted).—Hidáyah, vol. i, page 191.

* See *ante*, page 365.

† It is a rule that whatever is prohibited by reason of consanguinity is prohibited by reason of fosterage; but as far as marriage is concerned, there are one or two exceptions to this rule; for instance, a man may marry his sister's foster mother, or his foster sister's mother, or his foster son's sister, or his foster brother's sister.—Macn. M. L., Chap. VII, Princ. 23.

‡ Fatáwá Alamgíri, vol. i, page 484.—B. Dig., page 194.

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the whole would be brothers and sisters to the first suckling, and their children would be his nephews and nieces, and the brother and sister of the man would be his paternal uncle and aunt, and the brother and sister of the nurse would be his maternal uncle and aunt; and in like-manner as to his grandfather and grandmother.—Fatáwá Alamgírí, vol. i, page 484.—B. Dig., page 194.

The illegality of affinity is also established by fosterage, so that the man's wife would be unlawful to the suckling, and the wife of the latter be unlawful to the man, and by the same analogy, in all other cases.—*Ibid.*

Exceptions,—

Principle. CCCVIII. In fosterage, it is lawful for a man to marry his sister's or brother's mother (*e*), son's sister, brother's sister, nephew's mother, son's sister's mother, paternal or maternal aunt's or uncle's mother, child's aunt or grandmother, child's brother's daughter, and his paternal aunt's daughter. (See the detail below).

(*e.*) Except a sister's mother by fosterage, whom it is lawful for a man to marry, although he cannot lawfully marry his sister's mother by blood, as she must either be his own mother, or the enjoyed of his father, both of whom are prohibited to him, contrary to her mother by fosterage.*

A sister's mother by fosterage may be conceived in different ways: First,—where a man has a sister by blood, who has a foster-mother, whom he may lawfully marry; secondly,—where a man has a foster-sister, who has a mother by blood, whom he may likewise lawfully marry; and thirdly,—where a male and female infant, between whom there is no affinity, suck at the breast of one woman, and the female infant also sucks at the breast of another woman, in which case the male infant may lawfully marry the last woman, who is the foster-mother of the female infant, (that is to say, of his foster-sister).*

* Hidáyah, vol. i, pages 191 & 192.

CCCIX. A man may also lawfully marry the sister of his foster-son, although it be not lawful for him to marry the sister of his son by blood, as she must be either his own daughter, or the daughter of his enjoyed wife, both of whom are prohibited to him.* *Principle.*

It is not lawful for a man to marry the sister of his son by consanguinity, while it is lawful in the case of fosterage; for the former must be either his own daughter or his step-daughter, while the latter is neither; and if a case should occur in consanguinity where the sister of a man's son is neither his own daughter nor daughter-in-law, as for instance, when a maid, the property of two persons, brings forth a child which is claimed by both, and its descent is in consequence established from each, and each master has a daughter by another woman, it would be lawful for each of them to marry the daughter of his co-owner, though the result should be that he is marrying the sister by consanguinity of his own son.†

CCCX. A man may lawfully marry the sister of his foster-brother, it being allowed to him to marry the sister of his brother by blood, (that is the maternal sister of his paternal brother).* *Principle.*

The sister of one's brother by fosterage is lawful in the same way as his sister by descent would be.†

As for instance, when a man's half-brother by the father has a sister by the mother's side, it is lawful for the man to marry her.†

CCCXI. It is not lawful for a man to marry the mother of his sister by consanguinity, while it is lawful in fosterage.† *Principle.*

For, in the former case, she must either be his own mother or his father's wife; and, in the latter case, this objection does not exist.†

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* Hidáyah, vol. i, pages 191—193.
† Fatáwá Alamgíri, vol. i, pp. 484 & 485.—B. Dig., pp. 194 & 195.

LECTURE XII.

Principle. CCCXII. In fosterage, the mother of one's brother or of his paternal or maternal uncle or aunt is lawful to him. And, in like manner, it is lawful for one to marry the mother of his nephew and the grandmother of his child by fosterage; but this is not lawful in consanguinity. So, also, it is lawful to marry the aunt of one's child by fosterage, and so the mother of his son's sister, and the daughter of his child's brother, and the daughter of his child's paternal aunt.*

Principle. CCCXIII. And, in like manner, it is lawful for a woman to marry her sister's father, son's brother, niece's father, child's grandfather, or child's maternal uncle, by fosterage, though all these are unlawful where the relationship is established by descent.*

Principle. Of maternity. CCCXIV. Maternity admits of positive proof, because separation of a child from its mother can be seen. And the testimony of one woman is sufficient to establish it.*

For all that is required is identification of the child, and the Prophet himself accepted the testimony of the midwife to the birth of a child.—Fatáwá Alamgírí, vol. i, page 722.—B. Dig., page 389.—*Vide* Hidáyah, vol. iii, page 133.

Principle. Of paternity. CCCXV. Paternity of a child is established principally by marriage or the presumption of marriage between its parents, or by the relation subsisting between its mother (if a slave) and her master at the time of its conception.*

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* *Vide* Fatáwá Alamgírí, vol. i, pp. 484 & 722.—B. Dig., pp. 195 & 390.

To establish the descent of a child from a man, it is necessary that the relation between its parents, as husband and wife, or master and slave (which legalizes their intercourse), should have subsisted at the period of its conception.—B. M. L., page 36.

CCCXVI. The parentage or descent of a child who is born of a formally married wife upon the expiration of the usual period (*f*) from the solemnization of marriage* is, on proof of its birth, established in the husband of its mother without any claim or acknowledgment on his part, and cannot be repudiated by the husband upon a simple denial, nor by any thing short of the formal *lián* (*g*), or imprecation.

Principle.

Of parentage.

(*f*). The usual period of the birth of a child is after the expiration of six months from the date of marriage.—See *ante*, page 174.

(*g*). *Lián*, in the language of the law, signifies testimonies confirmed by oath, on the part of husband and wife, in case of the former accusing the latter of adultery.—Hidáyah, vol. i, page 344.

Lián, or Imprecation.

ANNOTATIONS.

cccxvi. There are three degrees in the establishment of paternity. The first is a valid marriage, or an invalid one that comes within the meaning of one that is valid. An invalid marriage that has been consummated is joined to valid ones in some of their effects, among which is the establishment of paternity. The effect of this first degree is to establish paternity without a claim, and to prevent its rejection by a mere denial, though it may be rejected by *lián*, or imprecation, in the case of a valid marriage, but not where the marriage is invalid; and if the case does not admit of *lián*, the paternity of the child cannot be rejected. The right of rejection continues only until the husband has expressly acknowledged the paternity of the child, or has made some manifestation of acquiescing in it, by the acceptance of congratulations, or the purchase of things necessary in connection with its birth, or a long time has elapsed with knowledge of the event, or until something has happened that cannot be undone, as, for instance, the commission of an offence by the child, and the imposition of a fine in consequence of the *âkilah* of the father.—Fatáwá Alamgíri, page 722.—B. Dig., page 390.

* A child born six months after the marriage is considered to all intents and purposes the offspring of the husband; so also a child born within two years after the death of the husband or after divorce.—Macn. M. L., Chap. VII, Princ. 31.

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(*g.*) If a man slander his wife (that is to say, accuse her of whoredom), or deny the descent of a child born of her, by saying "this is not my child," and she require him to produce the ground of his accusation, imprecation is incumbent upon him, provided both parties be competent in evidence, (that is, of sound mind, adults, free, and Mussalmáns,) and that the woman be of a description to subject her slanderer to punishment, (that is, *married*,) for if she be not such (as if she have been, for instance, enjoyed under an invalid marriage, or delivered of a child whose father is unknown,) the man is not under any obligation to make an imprecation, although she be a person competent in evidence.—Hidáyah, vol. i, page 344.

Lián, according to the tenets of our doctors, is a testimony confirmed by oath, as was before observed; and it involves, on the part of the husband, if his accusation be false, the curse *of* God, which stands as a substitute of punishment for slander,—or, on the part of the woman, the wrath of God, which stands in the place of punishment for whoredom, if it be true.—Hidáyah, vol. i, page 345.

When a man has denied the child of his wife after its birth, or at the time that he is receiving congratulations on the event, or necessaries connected with the birth are being purchased, his denial is valid, and the *lián* (imprecation) must be administered to him; but if he should not deny it till after this, though the *lián* is still to be administered, the *nasab*, or paternity, of the child is established. If, however, he were absent from his wife and not aware of the child's birth till informed of it, he would have, according to *Abú Hanífah*, as much time for denial as is usually occupied with congratulations; or, according to the other two, the whole time of the *nifas*, after receiving the intelligence; for the paternity does not become binding on a man till after the child's birth is made known to him, so that the time of receiving intelligence is like the time of the birth itself.—Fatáwá Alamgírí, vol. i, page 698.—B. Dig., page 340.

Principle. CCCXVII. If, on the other hand, a married woman should produce a child *within* six months from the date of her marriage, which is the shortest period of gestation according to the Muhammadan

law,* its descent is not established from the husband, unless he claims it; and even in the event of his claiming it, if he should admit it was the fruit of fornication, its descent is not established.†

Principle.

CCCXVIII. When a woman under *iddat*‡ is delivered of a child, the parentage is not established

ANNOTATIONS.

cccxv—cccvii. If a man marry a woman, and she bring forth a child *within* less than six months after the marriage, the parentage of the child is not established in the husband, as pregnancy in that case appears to have existed previous to the marriage, and consequently cannot be derived from him: but if she be delivered *after* six months, it is established, whether he acknowledge it or not, because then the marriage appears to have existed at the time of impregnation, and the term of pregnancy is complete. If, moreover, the husband *deny* the birth, it may be proved by the evidence of one woman, after which the parentage is established in virtue of the marriage; and such being the case, if he persist in denying the child, imprecation becomes incumbent, because his denial then amounts to an imputation on his wife's chastity, since it implies a charge of adultery against her.—Hidáyah, vol. i, page 382.

If a man should marry a woman, and she is delivered of a child *within* six months from the day of marriage, the paternity of the child from him is not established, because conception must have taken place *before* the marriage; but if she is delivered at six months or more, its paternity is established, because of the subsisting *firásh*, or bed, and the completion of the term of pregnancy, whether he acknowledge the child or remain silent.—Fatáwá Alamgírí, vol. i, page 727.—B. Dig., pages 390, 391.

And if a man should commit fornication (*zinú*) with a woman, and she should become pregnant, and he should then marry her, and she be delivered of a child within six months of the marriage, its paternity from him would not be established, unless he should claim it, and should *not* say, "it is of fornication;" but if he should say, "it is mine by fornication," its paternity would not be established, neither would it inherjt from him.—Fatáwá Alamgírí, vol. i, page 727.—B. Dig., page 391.

* The shortest period of gestation in the human species is six months.—See *ante*, page 174.

† B. M. L., p. 36.

‡ Abstinence from carnal connection on the occasion of divorce, or husband's death.

LECTURE XII.

(according to *Abú Hanífah*), unless the birth be proved by the evidence of two male witnesses, or *one* male and two female (*h*).

(*h*.) This is a rule where there is no apparent pregnancy, or the same is not acknowledged by the husband: but if the pregnancy be apparent, or the husband have acknowledged it, the parentage is established independent of the testimony of witnesses.—Hidáyah, vol. i, page 380.

Principle.

CCCXIX. If a woman under *iddat* from the death of her husband bring forth a child, and declare it to be his, and the heirs confirm her assertion, though no person bear evidence to the birth, the child is held to be descended of the husband, according to all our doctors(*i*).—Hidáyah, vol. i, page 381.

Principle.

(*i*.) This, with respect to *inheritance*, is evident, as inheritance is a sole right of the heirs, and consequently their testimony or acknowledgment is to be credited in every matter which affects it. A question, however, may arise in this case whether the parentage of the child be by such testimony established with respect to others than those heirs: and upon this the learned in the law observe, that if those heirs be persons of a description capable of being admitted as witnesses, the parentage is established with respect to all others as well as themselves.—Hidáyah, vol. i, page 381.

CCCXX. Where a man and woman lived together and behaved familiarly to each other like a husband and wife, their marriage is presumed* by law, if there was no legal prohibition to their being espoused to each other, and the descent of the child or children, who are the fruit of such association, is established from the man by his claim or acknowledg-

* "It does not, however, follow," says Mr. Baillie, "that in all cases of disputed paternity, marriage of the child's parents must be proved. The constitution of the relation and its proof are obviously distinct."—B. M. L., page 40.

ment ;* or even without it, but from the very fact of their so associating together, and the man's treatment towards the issue as his own, as well as from the woman's declaring the child or children to be his issue, and herself to be his wife.

When he has once acknowledged the child, either expressly or circumstantially, his denial of it afterwards is not valid, whether it be at the time of the birth or after it. Express acknowledgment is saying, "The child is of me," or, "This is my child," and circumstantial is silence when congratulated on it. Still, if he deny, he must take the *lián*.† Fatáwá Alamgírí, vol. i, page 703.—B. Dig., page 340.

If a person say in respect of a child, "It is my son," and afterwards die, and then the child's mother also say, "It is his son, and I am his widow," they both inherit from him, that is the child and its mother inherit from the acknowledger.—Sharh-ul-Vikáyah, vol. ii, page 438.

The British Court of Justice, especially the Privy Council, have gone further than the above.—See *ante*, pages 121—127 and 318.

If a man say of a boy, "this is my son," and afterwards die, and the mother come declaring herself to be the wife of the deceased, she must be considered as such, and the boy as his child, and they both inherit of him. The case supposes the woman to be one whose freedom and maternal right in the child are matters of public notoriety, and the validity of a marriage is ascertained by circumstances. But if the woman be not known to be free, and the heirs of the husband maintain that she is only an *Umm-i-walad*,‡ she is not entitled to any inheritance, because the mere appearance of freedom (supposing this case to occur in a *Musalmán* territory), although it defend the party from

* If a man acknowledge another to be his son, and there be nothing which obviously renders it impossible that such relation should exist between them, the parentage will be established.—Macn. M. L., Chap. VII, Princ. 33.

† See *ante*, pages 371 & 372.

‡ When a slave has already borne a child to her master, her condition is materially improved. She can no longer be sold, but is entitled to her freedom at his death. She thus acquires the character of a fixed member of his family; any child whom she may subsequently bring forth, is so far presumed to have been begotten by him, that its descent is established without any claim or acknowledgment on his part. Its condition, however, differs in one respect from that of a child begotten in marriage, that it is liable to repudiation by a simple denial.—B. M. L., page 39.

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slavery, is not sufficient to establish a claim of inheritance. Hidáyah, vol. i, pages 384 & 385.

Principle. CCCXXI. The descent of the first born child of a slave girl is established in its mother's master, if he claim it or acknowledge it to be his.*

Principle. CCCXXII. After giving birth to a child, the slave is termed "*Umm-i-walad*" (child's mother), and entitled to freedom. Then the descent of the child or children which she may subsequently bear is established in her master even without any claim or acknowledgment on his part, if only it is not repudiated by a denial.† (See the last note of the last page.)

ANNOTATIONS.

cccxxi, cccxxii. When a female slave bears a child to her master she becomes an '*Umm-i-walad*,' and her condition becomes the same as that of a *mudabbar* slave,‡ her child's parentage shall not, however, be established unless acknowledged by the man; but after his so acknowledging, if

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* The last degree in the establishment of paternity of a child is when it is born of a slave girl, who has never before borne a child to her master, and in that case, it is not accounted his without an express claim or acknowledgment of it as his offspring.—B. M. L., page 39.

† The first born child of a man's female slave is considered his offspring, provided he claim the parentage, but not otherwise; but if, after his having claimed the parentage of one, the same woman bear another child to him, the parentage of that other will be established without any claim on his part.—Macn. M. L., Chap. VII, Princ. 32.

The only legal slaves are captives in religious warfare, or wars undertaken for the propagation of Muhammadan faith, and the descendants of such captives. Of these there are probably very few in the British dominions in India; and to constitute the legal descent of a child from a man in this country, it must, therefore, in general, be necessary that it should have been begotten in marriage.—B. M. L., page 40.

It is further to be observed, that the value of cohabitation as an inference of marriage depends upon the moral feelings of the community, and there is no reason to doubt, that though the number of legal slaves in the British dominions in India must be very small in the strict sense of the Muhammadan law, yet that there are persons who, in the common parlance of the country, are called slaves, and that the intercourse of these with their masters is just as lawful in the estimation of all good Muhammadans, with the exception, perhaps, of such as are versed in their law, as if they were slaves in the most rigid sense.—B. M. L., pages 49 and 50.

‡ See *ante*, page 275, *notes*.

CCCXXIII. The parentage of a person of unknown descent, if acknowledged by a person to be his or her child, is, by such acknowledgment, established in the acknowledger. The acknowledger and the acknowledged are, nevertheless, required to be such as to admit the possibility of standing to each other in the relation of parent and child (*j*),—that is to say, the acknowledger, if a female, must *at least* be nine years and a half, and if a male, twelve years and a half, older than the acknowledged (*k*). The acknowledged must believe his being the acknowledger's child, or assent to his being so (*l*). The ascent of an infant too young to give an account of himself is not, however, requisite to the validity of the acknowledgment (*m*).*—See *ante*, page 93. LECTURE XII. *Principle.*

CCCXXIV. When the preceding conditions concur in an acknowledgment of parentage, the person acknowledged becomes an heir of the acknowledger, *Principle.*

ANNOTATION.

the woman brought forth another (child), its parentage is established (in him) without its being claimed, but not established if it is denied by the man.—Sharh-ul-Vikáyah, vol. ii, page 482.

cccxxiii. If a person acknowledge the parentage of a child who is able to give an account of himself, saying, "this is my son," and the ages of the parties be such as to admit one being the child of another, and the parentage of the child be not well known to any person, and the child himself verify the acknowledgment, his parentage is established in the acknowledger, although he (the acknowledger) be sick; because the parentage in question is one of those things which affect the acknowledger himself only, and no other person.—Hidáyah, vol. iii, page 168.

* Acknowledgment is in some instances sufficient evidence of parentage, but there are three conditions necessary to its validity: 1—The ages of the acknowledger and the person acknowledged must be such as to admit at least of the possibility of their standing to each other in the relation of parent and child; 2—The person acknowledged must be of unknown descent; and 3—He must believe or assent to the fact of his being the acknowledger's child.—Ináyah. *Vide* B. M. L., page 40.

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and is entitled to participate in his inheritance with his other heirs, if any, of the same degree or description, even though he were sick at the time when the acknowledgment was made (*n*).*

(*j*.) It is made a condition, in this case, that the ages of the parties be such as to admit of the relation of parentage; for if it were otherwise, it is evident that the acknowledger has spoken falsely. It is also made a condition, that the parentage of the boy be unknown; for if he be known to be the issue of some other than the acknowledger, it necessarily follows that the acknowledgment is null.* Hidáyah, vol. iii, pages 168 and 169.

(*k*.) It is necessary for the acknowledger, if a female, to be nine years and a half older than her (the acknowledged), but if he (the acknowledger) be a male, it is necessary for him to be twelve years and a half older than the acknowledged.*—Jowharat-un-Nayyirah, the book on Acknowledgment.

(*l*.) It is also made a condition, that the boy verify the acknowledgment, because he is considered as his own master, as he is supposed able to give an account of himself. It were otherwise, if the boy could not explain his condition, for then the acknowledgment would have operated without his verification.—Hidáyah, vol. iii, page 169.

(*m*.) It is to be observed, (however,) that in all these cases the confirmation of the party concerning whom the acknowledgment is made is requisite, excepting* the acknowledgment with respect to a child, when so young as not to be able to give an account of himself.—*Ibid.*

(*n*.) It is to be observed that the acknowledgment, in this instance, is not rendered null by sickness, because parentage is an original and not a supervenient want. By the establishment of the parentage, therefore, the boy becomes one of the acknowledger's heirs in the same manner as any of his other heirs.—*Ibid.*

(*n*.) This should be confirmed by the young man who is discreet and able to give an account of himself; but it is

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* *Vide* Baillie's M. L., p. 41 *et seq.*

not necessary for an infant to confirm the same.*—Jowharat-un-Nayyirah, the book on Acknowledgment. LECTURE XII.

(*j—n.*) If a person acknowledged a boy like whom one could be begotten by him (the acknowledger), and whose descent is not known so as to be his (the acknowledger's) son, and the boy confirm the same, his parentage is established (in the acknowledger), even though he were sick (when the acknowledgment was made): he will participate in the inheritance with the (other) heirs, because the person's acknowledgment of the boy being his son is that which affects his person, and is not transferred to any other than himself. Thus it must affect him alone.*—Jowharat-un-Nayyirah, the book of Acknowledgment.

Acknowledgment is also applicable to the establishment of certain other degrees of kindred, besides that of parentage.

CCCXXV. Acknowledgment by a man is valid also with respect to his parents (*o*), wife and emancipator, whether made in health or sickness; but the assent or confirmation of all those persons, though made after the acknowledger's death, is necessary to the establishment of relations between parties. Such acknowledgment, however, affects the acknowledger himself, and not any other. *Principle.*

(*o.*) If a person acknowledge his *parents* or his *son,* (as if he should declare that a certain man is his father, or that

ANNOTATIONS.

cccxxiii—cccxxv. A man's acknowledgment with respect to parents, child, wife, and emancipator is valid, because this (acknowledgment of) parentage does not affect another; but the confirmation by every one of the acknowledged is requisite. If, however, the child be such as it is impossible for a person like the acknowledger to beget one like him (the acknowledged), then the claim for the son is invalid by reason of the impossibility, no matter whether it be confirmed or not by the son (himself), or by proof.*—Jowharat-un-Nayyirah, the book on Acknowledgment.

* *Vide* B. M. L., p. 41 *et seq.*

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'a woman is his mother,' or that 'a certain person is his son,' and the ages of the parties admit of those relations,) or if a person acknowledge a particular woman to be his wife, or a particular person to be his mowlá' (that is his emancipator, or his freedman),—in all these cases the acknowledgment is valid, as affecting only himself, and not any other.—Hidáyah, vol. iii, page 169.

In the same manner, also, if a woman acknowledge her parents, or her husband, or her mowlá, it is valid for the same reason. A woman's acknowledgment of a *son*, however, is not valid,—as such acknowledgment affects her husband, in whom the parentage is established: her acknowledgment of a son, therefore, is not valid, unless the husband confirm her declaration (as the right appertains to him,) or that it be verified by the birth being proven by the evidence of one midwife, which suffices in this particular.—*Ibid.* Thus,—

Principle. **CCCXXVI. The acknowledgment by a woman with respect to her father, mother, husband, and emancipator, is also valid, but not so with respect to her child.***

ANNOTATIONS.

cccxxvi. A woman's acknowledgment with respect to (her) parents, husband and emancipator is valid, because this relation affects herself, and is not transferred to any other.†—Jowharat-un-Nayyirah, the book on Acknowledgment.

A woman's acknowledgment with respect to a son is not valid, inasmuch as the parentage affects another,—that is, husband; for he must descend from him unless it be confirmed by the husband, he being competent to do the same, or the birth be proved by the testimony of a competent woman (*i.e.*, the midwife.)†—Ináyah, vol. i, page 215.

* This exception is to be understood only of a woman who is married, or in her *iddat*; and even with respect to a *femme couverte*, her acknowledgment is valid, if credited by her husband, or confirmed by the testimony of the midwife, for all that is necessary evidence of the actual birth to which the testimony of one woman is sufficient, the ascription of the child to the husband being an inference of law from the fact of marriage, as already observed, which can be rebutted by the *lián*, or imprecation.—B. M. L., page 42.

† *Vide* B. M. L., p. 41, *et seq.*

CCCXXVII. The confirmation concerning parentage is valid, although made after the death of the acknowledger, because the relation of parentage exists after death. In the same manner, also, the confirmation of a wife, after the death of her husband, is valid; because the *iddat* is one of the effects of marriage, and that exists after the death of the husband, whence it may be said that marriage *itself* endures in one shape; and, therefore, the confirmation of the wife after the death of her husband is valid.—Hidáyah, vol. iii, page 170. *Principle.*

CCCXXVIII. If a person acknowledge another to be his *uncle*, or *brother*, the acknowledged is entitled to inherit from the acknowledger, if the latter has no other heir, and *not*, if he has any (*h*). *Principle.*

(*h.*) If a person acknowledge an *uncle* or a *brother*, such acknowledgment is not credited, so far as it relates to the establishment of the parentage, because of its operating upon another than the acknowledger.* If, therefore, the acknowledger have a known heir, whether near or remote, the whole of the inheritance goes to him, and not to the person in whose favor the acknowledgment is made, since the parentage not having been established on the part of the acknowledger, no obstacle can thence arise to the inheritance of a known heir. If, however, the acknowledger have no other heir, the person in whose favor he makes acknowledgment is, in that case, clearly entitled to the inheritance, as every person has full power over his estate when he has no heir; whence it is that a person may bequeath the whole of his property in legacy, provided he have no heirs. The person in whose favor the acknowledgment is made is, therefore, in this case, entitled to the whole of the property, although the parentage be not proven, as that would tend to affect another, namely, the father or grandfather of the acknowledger.—Hidáyah, vol. iii, page 173.

* See *ante*, page 92.

LECTURE XIII.

ON DIVORCE (TALÁK).

Talák defined.

TALÁK (repudiation, divorce), in its primitive sense, means dismission: in law, it signifies dissolution of marriage, or the annulment of its liability by (the use of) certain words.*

Preliminaries.

Talák may be given either in the present time, or may be referred to a time in future. It may be pronounced before or after consummation. It may be given by writing as well as verbally, and in the *Arabic* or in a different language.†

The words by which talák is given is of two kinds: *saríh* (express), and *kináyat* (ambiguous, metaphorical, or implicative).‡

A divorce may be effected in the *Sunní* or *Badaí* form. The *Sunní* form of divorce is in accordance with the *Sunnat*, or traditions. The *Badaí* form is that which is new and irregular. The *Sunní* divorce is again of two kinds: '*ahsan*,' or the best; and '*hasan*,' or good. It is '*ahsan*' if the husband once expressly pronounces to his enjoyed, but unpregnant, wife the sentence of divorce while she is in *tuhr* (purity)§, during which he has had no carnal connection with her, and leaves her to complete the prescribed term of *iddat*‖, upon the expiration whereof the

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* Hamilton's Hidáyah, vol. i, page 200.

Talák, as defined in law, is a release from the marriage tie, either immediately or eventually.—Fatáwá Alamgírí, vol. i, page 491.—B. Dig., page 205.

† Repudiation or divorce is pronounced also in Persian words where that language is spoken. In India, however, the Arabic word 'Talák' is almost invariably used with an appropriate verb in Hindustání.

‡ Divorce is of two kinds:—*Saríh*, or express; and *kináyat*, or by implication.—See pages 385 & 412—416.

§ Purity, that is, the space between two occurrences of a woman's courses.

‖ '*Iddat*' is a woman's abstinence from sexual enjoyment upon divorce or dissolution of her marriage. In divorce, the term of *iddat* for a free woman is four

repudiation becomes an irrevocable or irreversible divorce unless revoked in the interim. It is '*hasan*,' or good, when the husband gives his wife *one* repudiation in a *tuhr* in which he has had no sexual intercourse with her, and then he gives her another repudiation in the next *tuhr*, and after that another in the succeeding *tuhr*. This (third) repudiation being irrevocable,* completes the divorce, even without waiting for the expiration of the *iddat*, or delivery—if she happens to be pregnant. When the woman is a slave, divorce is completed by two repudiations, whether the husband himself be a slave or free.

Repudiation, or divorce, is either revocable (*rajaí*) or irrevocable (*báin*).†

In the *áhsan*, or best form, the single repudiation that is pronounced is revocable before the completion of the *iddat*, after which it is irrevocable or irreversible; in the other forms, the first and second are revocable, with respect to an enjoyed wife, and the third is always irrevocable.‡

Principle.

CCCXXIX. If a man repudiates his wife three times in one *tuhr*,§ either in a single sentence or in different sentences, or joins two repudiations during

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ANNOTATIONS.

cccxxix. The *Talák-i Badaí*, or irregular divorce, is where a husband repudiates his wife by three divorces at once; (that is, included in one sentence), or, where he repeats the sentence separately, thrice within one *tuhr*; or if a husband give three divorces in either of those ways, the three hold good, but the divorcer is an offender against the law.—Hidáyah, vol. i, page 203.

The pronouncing of two divorces within one *tuhr* comes under the description of *Badaí*, or irregular; the same is that of three divorces, as already intimated.—Hidáyah, vol. i, page 204.

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months and ten days, and for a slave girl is half of that period.—See Lecture XIV.

* It is only after one or two repudiations that a wife can be retained, and three must, therefore, be irrevocable.—B. Dig., page 206, note. See Lecture XIV.

† See the Annotations at pages 388 & 391.

‡ See Lecture XIV.

§ *Vide*, page 382, *Note*.

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one *tuhr* in a single sentence or in different sentences, the divorce takes place in the *Badaí*, or irregular, form; and the third repudiation, which is irreversible, completes divorce, though the husband commits a sin for having divorced his wife irregularly.

Principle.

CCCXXX. If a man repudiates an enjoyed wife either at a time when the monthly courses are actually on her, or during a *tuhr* in which there has been sexual intercourse between them: in this case also, divorce is effected in the *Badaí*, or irregular, form, but is completed upon the expiration of the *iddat*:—this, however, ought to be revoked.

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cccxxx. The *Badaí*, or new and irregular form of repudiation, is of two kinds: one, where the innovation is in respect of number, and the other, where it is in respect of time. The former is, when a man repudiates his wife three times in one *tuhr*, either in a single sentence or in different sentences, or joins two repudiations in one *tuhr* in a single sentence, or in different sentences. When he does this, the repudiation takes place, but he is sinful for so doing. The other kind of *Badaí*, or new repudiation, and which is so in respect of time, is, when a man repudiates an enjoyed wife who is subject to the monthly courses, either at a time, when they are actually on her, or during a *tuhr*, in which there has been sexual intercourse between them. Such a repudiation is also effective, but it ought to be revoked, or, more correctly speaking, revocation is incumbent on the husband. This kind of *Badaí* repudiation is necessarily restricted to an enjoyed wife, because one who has not been enjoyed may be repudiated by the *sunní* form without any reference to time. In the first of the *badaí* forms the repudiations become a complete divorce as soon as they amount to three; in the second, the repudiation does not become divorce until the completion of the *iddat*.—Fatáwá Alamgírí, vol. i, page 492.—B. Dig., page 207.

cccxxx, cccxxxi. There are two forms of repudiation: one termed *Sunní*, or that which is agreeable to the *sunna*, or traditions; and the other termed *Badaí*, or that which is new or irregular,—each being distinguished from the other by number and time. The *Sunní* form of repudiation, or that which is conformable to the traditions in number and time, is of two kinds,—the *ahsan*, or best, and the *hasan*, or good. The '*ahsan*,' or best, is when a man gives his wife one revocable repudiation in a *tuhr*, or

CCCXXXI. If a husband once expressly (*a*) utters to his enjoyed wife the sentence of repudiation in her *tuhr*, during which he has had no carnal connection with her, and then leaves her to observe the term of *iddat*, or abstinence, and do not revoke the repudiation in the interim, the divorce becomes irreversible and complete in the *ahsan* or best form (*b*), upon the expiration of the term of her *iddat*. *Principle.*

(*a.*) *Talák-i Sarih*, or express divorce, is where a husband delivers the sentence in direct and simple terms, as if he were to say, "I have divorced you," or "you are divorced," which effects a *talák-i rajaí*, or divorce reversible,—that is to say, a divorce such as leaves it in the husband's power lawfully to take back his wife at any time before the expiration of the *iddat:* and these forms are termed *sarih*, or express, as not being used in any sense but *divorce.*—Hidáyah, vol. i, page 213.

(*b.*) In the '*ahsan*' or best form of divorce, there are four requisites: (viz.,)—that the sentence of divorce be delivered

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period of purity, (that is, between two occurrences of the courses), during which he had no sexual intercourse with her, and then leaves her for the completion of her *iddat*, or the birth of the child if she happen to be pregnant, whereupon the repudiation, unless revoked in the meantime, becomes complete, or in other words, a divorce.—Fatáwá Alamgírí, vol. i, page 491.—B. Dig., pages 205 & 206.

cccxxxi. Divorce is of three kinds: first, the '*ahsan*,' or most laudable; second, the '*hasan*,' or laudable: (which are the distinctions of the '*Talák-us-Sunna*'); and third, the *Badaí*, or irregular.*

The '*Ahsan talák*,' or most laudable divorce, is where the husband repudiates his wife by a single sentence, within a *tuhr* (or term of purity), during which he has not had carnal connection with her, and then leaves her to the observance of the *iddat*, or prescribed term of probation.—Hidáyah, vol. i, page 202.

* *Talák-us-Sunna* (or *Sunnat*) literally means 'divorce according to the rules of *Sunna*, in opposition to *talák-ul-badat*, which signifies a novel, unauthorized, or heterodox mode of divorce: the terms regular and irregular are here adopted as being the most familiar.—Hidáyah, vol. i, page 201.

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only once; that the woman (at that time) be pure (*i. e.*, not in the state of menses); that she be an enjoyed wife; and that she be not pregnant.—Jámi-ur-Ramúz, vol. ii, page 276.

Principle.

CCCXXXII. If a man repudiate a wife, enjoyed or unenjoyed, pronouncing expressly or ambiguously (rather impliedly) the sentence of repudiation in three successive *tuhrs*, once in each, without having carnal connection with her in the interim, the third repudiation becomes irrevocable without waiting for the *iddat*, though the woman must observe the *iddat*. The divorce so effected is called *hasan* (good).

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cccxxxii. The *talák-i hasan*, or laudable divorce, is where a husband repudiates an enjoyed wife by three sentences of divorce, in three *tuhrs*.—Hidáyah, vol. i, page 202.

The *hasan*, or good, is when he gives her one repudiation in a *tuhr*, or period of purity, in which he has had no sexual intercourse with her, and then gives her another repudiation in the next *tuhr*, and a third in the *tuhr* after that. The third being irrevocable completes the divorce, without waiting for the expiration of the *iddat*, or delivery, if she happens to be pregnant. When the woman is a slave, the divorce is completed by two repudiations, whether the husband be a slave or free.*—Fatáwá Alamgírí, vol. i, page 491.—B. Dig., pages 206, 207.

cccxxxii, cccxxxiii. Adherence to number is required by the *Sunní* form of repudiation, both with respect to the enjoyed and unenjoyed wife, who are here on the same footing, but adherence to time is required only in the case of the enjoyed wife; and one who is unenjoyed may be repudiated according to that form at any time, either in a *tuhr*, or during the actual occurrence of the courses. A wife with whom a valid retirement has taken place† is in this respect on the same footing as one whose marriage has been consummated.—*Ibid.*

* To render the *tuhr*, or period of purity, in which there has been no sexual intercourse, a fit time for repudiation in the *Sunní* form, there must have been no such intercourse, nor any repudiation, during the courses immediately preceding it; either of which would render the following *tuhr* altogether unfit for that purpose.—B. Dig., page 206.

† See *ante*, pages 357 & 358.

CCCXXXIII. An enjoyed wife may also be repudiated during her courses; and in such repudiation, divorce will be effected upon the expiration of *iddat*, provided it was not revoked after the first or second. *Principle.*

CCCXXXIV. When a woman by reason of extreme youth or age, or some morbid obstruction, is not subject to courses, and her husband is desirous of repudiating her according to the *Sunna* (*a*), he should give her one repudiation, and then another after the lapse of a month, and a third after the lapse of another month (*b*).—Fatáwá Alamgírí, vol. i, page 493.—B. Dig., page 207. *Principle.*

(*a.*) *Sunna* (that is, attention to the mode prescribed by the *Sunna*) in divorce, appears in two shapes: adherence to *number*, and to *time*;—to the former, by restricting the sentence to that of a single divorce reversible, in which the enjoyed and unenjoyed wife are the same;—and to the latter (in which the enjoyed wife is solely considered), by pronouncing the divorce in a *tuhr*, during which the husband has not had carnal connection with her.—Hidáyah, vol. i, page 204.

(*b.*) It is here to be observed that if the first divorce be given in the beginning of the month, the three months from that period are to be counted by the lunar calendar; and if in the middle of it, by the number of days, with respect both to completion of divorce and of *iddat*.—Hidáyah vol. i, page 205.

CCCXXXV. When a man repudiates his wife thrice before consummation, three repudiations take *Principle.*

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cccxxxiii. If a man repudiate his wife during her courses, it is valid; because, although divorce within the term of the courses be disapproved, yet it is lawful nevertheless, as the disapproval is not on account of anything essential, but *merely* because a divorce given during the courses occasions a protraction of the *iddat*.—Hidáyah, vol. i, page 207.

cccxxxiv. If the wife be a person who, from extreme youth or age, is not subject to the courses, and her husband be desirous to repudiate

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effect upon her, unless there is a separation between the repudiations, and in that case she becomes irrevocably repudiated by the first, and the second and third do not take effect.*—Fatáwá Alamgírí, vol. i, page 526.—B. Dig., page 226.

Principle. CCCXXXVI. If a man be desirous of repudiating his pregnant wife by three divorces in the (*Sunní* or) regular way, he is first to pronounce a single sentence of divorce upon her, and at the expiration of one month another, and in the same manner, a third at the expiration of the next succeeding month.—Hidáyah, vol. i, page 206.

Principle. CCCXXXVII. If a husband become the proprietor of his wife (as a slave) either wholly or in part,

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her, by three divorces in the *Sunní* or regular way, he is first to pronounce a single sentence of divorce upon her, and at the expiration of one month, another, and in like manner, a third at the expiration of the next succeeding month, because the term of one month corresponds with a return of the courses, as is mentioned in the *Kurán*.—Hidáyah, vol. i, page 205.

cccxxxv. When a man divorces a woman before cohabitation, by saying to her "you are divorced thrice," three divorces take place upon her, because he has here given three collectively. But if he pronounce the three separately, saying "you are divorced,—divorced,—divorced," one divorce irreversible takes place from the first, but nothing from the second or third; because each repetition of the word 'divorced' is a separate execution of the divorce; and the first of them having already rendered the woman decisively and irreversibly divorced, it follows that the second or third cannot take effect upon her. And it is the same where he says, "you are divorced once and again," (where a single divorce takes place,) because the woman becomes completely divorced by the first part of the sentence.—Hidáyah, vol. i, page 233.

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* Repudiation of an unenjoyed wife being irrevocable, there is difficulty in giving her more than one; because, it will be seen hereafter that one irrevocable repudiation cannot be added to another.—Note by Mr. Baillie. *Vide* B. Dig., page 226.

or a wife the proprietress of her husband, separation takes place between them, possession by bondage and possession by matrimony being irreconcilable.—Hidáyah, vol. i, page 225.

CCCXXXVIII. If a man say to his wife, "you are divorced after my death," or "after *your* death," no consequence whatever ensues from this expression. *Principle.*

Because, in the first instance, he has applied the divorce to a time which forbids it, since a husband is not competent to the execution of divorce after death; and, in the second, the woman no longer remains a fit subject of it; and both these circumstances are essential to a legal divorce.—Hidáyah, vol. i, page 225.

CCCXXXIX. Repudiation cannot be qualified by an option. *Principle.*

Thus, a person says to his wife, "Thou art repudiated, and I have an option for three days," repudiation takes place and the option is void.—Fatáwá Alamgírí, vol. i, page 514.—B. Dig., page 217.

CCCXL. A husband may divorce his wife without any misbehaviour on her part, or without assigning any cause.* *Principle.*

CCCXLI. The divorce of every husband is effective, if he be of sound understanding, and mature age; but that of a boy, or a lunatic, or one talking in his sleep, is not effective. *Principle.*

For two reasons;—first, because the Prophet has said, "every divorce is lawful, excepting that of a boy or a lunatic;"—secondly, because a man's competency to act depends upon his possession of a sound judgment, which is not the

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cccxl. The husband has, at his option, either to continue the marriage with his wife, or to put her away.—Hidáyah, vol. i, page 245.

* Macn. M. L., Chap. VII, Princ. 24.
Against this arbitrary power, the payment of dower is the only check.—See Dower.

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case with infants or lunatics: and one talking in his *sleep* is the same, in this point, as a boy or a lunatic, since his words in this case are not the result of a deliberate option.—Hidáyah, vol. i, page 210.

Principle. CCCXLII. Repudiations by any husband who is sane and adult is effective,† whether he be free or a slave, willing, or acting under compulsion: and even though it were uttered in sport or jest, or by a mere slip of the tongue, instead of another word.*

Principle. CCCXLIII. A compulsory acknowledgment of repudiation is not valid, though repudiation itself under compulsion is so.*

Principle. CCCXLIV. If a youth under puberty should repudiate his wife, or another person should do so on his behalf, and the youth, after arriving at maturity, should allow what was done while he was a minor, the allowance, to have any effect, must be couched in terms expressive of a new repudiation, rather than a confirmation of the old one.*

Thus, if he should say—"I have allowed it," no repudiation would take place; but if he should say "I have

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cccxlii. The divorce of one acting upon compulsion, from threats is effective, according to our doctors.—Hidáyah, vol. i, page 210.

cccxliv. Repudiation by a youth under puberty, though possessed of understanding, is not effective; and that by a person who is insane, or asleep, or affected by pleurisy, or in a faint, or overcome by astonishment, is in the same predicament. So also repudiation by a lunatic with lucid intervals,—if pronounced while a fit is upon him, is ineffectual; but when given in a lucid interval, it is valid. And if a person should repudiate his wife in his sleep, and on waking should say to her, "I repudiated thee in my sleep," or "I have allowed that repudiation," still it would not take effect.*

* Fatáwá Alamgíri, vol. i, pp. 497 & 499.—B. Dig., pp. 208—211.

made it to happen," that would be sufficient to effect it *de novo.** LECTURE XIII.

CCCXLV. Repudiation by a dumb man by signs is effective, when the dumbness has been long continued, and his signs have become well understood; and it makes no difference whether he can write or not. Where the dumbness is supervenient to birth, and has not been of long continuance, no regard is paid to his signs ; when short of three, the repudiation is *Rajat*, or revocable. Repudiation by a dumb man in writing is also lawful.* *Principle.*

CCCXLVI. If a man pronounce a divorce whilst he is in a state of inebriety from drinking any fermented liquor, such as wine, the divorce takes place.—Hidáyah, vol. i, page 211. *Principle.*

CCCXLVII. Repudiation by a husband who has apostatized from the Muhammadan religion, and joined himself to the Dár-ul-Harb, or a foreign country, is without effect, but would become effective if he should return (as a Muslim) to the territory while his wife is still in her *iddat;* and in the case of a wife who apostatizes and joins herself to a foreign country, repudiation by her husband would not take effect upon her ; not even though she should return before her courses, according to Abú *Principle.*

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cccxlvi. The divorce of a dumb person is effectual, if it be expressed, by positive and intelligible signs, because signs of the dumb are authorized by custom, and are, therefore, admitted to stand in the place of speech, in the present instance, in order to answer the necessity of him who makes them. The various species of signs used by the dumb in divorce shall be set forth hereafter.—Hidáyah, vol. i, page 212.

cccxlvii. Repudiation by a drunken man, when the intoxication has been produced by grape or date wine, is effective according to "our doctrine."*

* Fatáwá Alamgírí, vol. i, page 498, 499.—B. Dig., pages 209 & 210.

LECTURE XIII. Hanífah; but Abú Yusuf held in that case that it would.*

Principle. CCCXLVIII. If a person should buy his wife and then repudiate her, the repudiation would have no effect. So also, if a woman should become the owner of her husband, and he should then repudiate her, the repudiation would be without effect. But if a woman should purchase her husband and emancipate him, and he should then repudiate her, the repudiation would be effective; and in like manner, if a husband, after purchasing his wife, should emancipate and then repudiate her while she is still in her *iddat*, the repudiation would take effect, by reason of the removal of the impediment.*

Principle. CCCXLIX. Divorce may be effected by writing as well as by word of mouth. Writings (purporting repudiation) are of two kinds: customary *(marsúm)* and unusual *(ghair marsúm)*. By writings that are not manifest repudiation cannot be effected, even though intended; whereas by writings that are manifest, though not customary, repudiation is effected, when such is the intention, but not otherwise; while by writings of the customary or regular description, it is effected, whether intended or not.*

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cccxlviii. If a man purchase his own wife (as a slave), and afterwards divorce her, divorce does not take place, because without the continuance of marriage it cannot exist, and in the present case the marriage has ceased in every shape whatever, since it does not continue even with respect to *iddat*; and in the same manner, when a wife becomes possessor of her husband, either *wholly* or in *part*, if the latter were to divorce her, her divorce does not take effect, because in this case also the marriage has ceased for the reasons before assigned.—Hidáyah, vol. i, pages 205 and 206.

* Fatáwá Alamgírí, vol. i, pages 499 & 533.—B. Dig., pages 209, 210 and 232.

CCCL. A sick man may divorce his wife even though he be on his death-bed (*a*).* LECTURE XIII.

Divorce by a sick man.

(*a.*) Repudiation by a man in his last illness is termed 'repudiation of a *farr*, or evador.'†

CCCLI. The woman divorced revocably or irrevocably by her husband at his death-bed does not lose her right of inheriting from him until the completion of her *iddat*, so if the husband died before the expiration of the *iddat*, she will inherit his estate (*b*), provided she did not, of her own accord and free pleasure, ask him to divorce, or procure it of him for a compensation (*c*). *Principle.*

(*b.*) When a man in his death-illness has repudiated his wife irrevocably, or given her three repudiations, and has then died while she is still in her *iddat*, she inherits from him in like manner according to 'us;' but if her *iddat* should expire, and he were then to die, she would not inherit. And if the repudiation were given in health or in an illness from which he recovers she would not inherit.†

(*b.*) If a man lying on his death-bed repudiate his wife, either by one irreversible divorce, or by three divorces, and die before the expiration of her *iddat*, she is still entitled to her inheritance from his estate; but if he should not die, until after the accomplishment of her *iddat*, she has no claim.—Hidáyah, vol. i, page 271.

(*b, c.*) When it is said that a woman irrevocably repudiated in such circumstances retains her right of inheritance until the expiration of her *iddat*, it is assumed that the

* By the Muhammadan law, a woman, on the death of her husband, is entitled to an inheritance from his estate, but it is possible that the husband may sometimes be induced from personal dislike, or other motive, when he finds himself dying, to repudiate his wife, in order to exclude her from her right of inheritance, in the event of his death; an injustice which the rules and cautions laid down in this chapter are intended to counteract and guard against: some of them are also designed to counteract any fraudulent collusion between the wife and her dying husband to the prejudice of his heirs.—Hidáyah, vol. i, page 279, *note*.

† Fatáwá Alamgírí, vol. i, page 638.—B. Dig., pp. 277 & 278.

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repudiation is without a request on her part; for if he had repudiated her at her own request, she would have no right of inheritance, unless she were compelled to ask for it, when her right would not be invalidated. In this case, that is, of irrevocable repudiation during a death-illness, competence on her part to inherit must exist at the time of repudiation, and continue till the husband's death.*

Principle. CCCLII. If a man pronounce upon his wife three divorces in sickness, and afterwards recover his health, but happen to die before the expiration of her *iddat*, she does not inherit (*d*).—Hidáyah, vol. i, page 286.

(*d.*) When a man has repudiated his wife in his illness, and has then recovered, but afterwards died, she does not inherit.*

Principle. CCCLIII. If the repudiation were given in health, or in an illness from which he recovers, she would not inherit.*—*Ibid*, page 277.

Principle. CCCLIV. If a man, being in health, slander his wife, that is, accuse her of adultery, and afterwards make asseveration respecting the same on his death-bed, she inherits of him (*e*).—Hidáyah, vol. i, page 287.

(*e.*) Muhammad says that she does not inherit: but if the slander be also declared upon his death-bed, she inherits according to all our doctors. The reason of this is that the slander amounts to the suspension of divorce upon a thing unavoidable by the woman, as it constrains her to opposition, that she may remove from herself the scandal of the imputation.—Hidáyah, vol i, page 287.

Principle. CCCLV. If a man make an *ílá*, or vow of abstinence, from his wife during his health, and she become divorced in consequence of it when he is upon his death-bed, she does not inherit of him.—*Ibid.*

* Fatáwá Alamgírí, vol. i, pp. 638—640. B. Dig., pp. 277, 279—280.

CCCLVI. If a man upon his death-bed repudiate his wife by a *reversible* divorce,* she inherits of him in all the cases here recited.—Hidáyah, vol. i, page 288.

Because the marriage is not finally dissolved, since it continues lawful for him to have carnal connexion with her; and such being the case, the principle upon which she inherits stands still unimpeached—*Ibid.*

CCCLVII. When a man has given his wife a revocable repudiation, whether it were given in health or in sickness, or with or without her consent, and either of them happens to die before the expiration of her *iddat*, they are reciprocally entitled to inherit without any difference of opinion.† *Principle.*

CCCLVIII. When a man in health has committed the repudiation of his wife to a stranger, and the stranger repudiates her in sickness, and the commission were of such a nature that it could not be withdrawn, she would not inherit.† *Principle.*

Divorce may (also) take place by the husband's delegating or committing to his wife the power of pronouncing to herself the sentence of divorce. This is comprehended under three heads, termed—'choice or option, liberty, and will or pleasure.' Delegation of divorce to one's own wife.

As a man may in person repudiate his wife, so he may commit the power of repudiating her to herself, or to a third party. This is termed 'Tafvíz,' and it is of three kinds: 'Ikhtiyár,' or choice; 'Amar-bi-yad,' or business in hand, and 'Mashíat,' or pleasure.—*Vide* Fatáwá Alamgírí, vol. i, page 542—B. Dig., page 236.

CCCLIX. The delegation of option by the husband to his wife confers on her the power of divorcing herself, but this right of option is restricted *Principle.*

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* In all these cases where it is said that the wife inherits, it means, '*in case of the decease of the husband, before the expiration of her Iddat*,'—the reason of which has been already mentioned.—Hidáyah, vol. i, page 288, *note.*

† Fatáwá Alamgírí, vol. i, page 638.—B. Dig., pp. 277 & 284.

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to the precise place or situation* in which she receives it, and is annulled by her removal. Intention on the part of the husband is requisite to constitute a delegation.

If a man say to his wife "choose" (thereby meaning divorce) or "divorce yourself," the woman has a power to divorce herself so long as she remains in the precise situation* in which she received it, but if she remove, or turn her attention to anything else, the power thus vested in her is done away, and her option no longer remains.—Hidáyah, vol. i, page 444.

The right of option of the woman is annulled upon the instant of her rising from her seat, as the circumstance proves her rejection of it. And where the husband thus addresses his wife, an intention of divorce is a condition requisite to the effect, because the words 'choose' is one of the implications of divorce, as it is capable of two constructions,—by one he desires the woman to choose herself, and by another to choose her clothes, and so forth; and if she choose herself,† a divorce irreversible takes place.—Hidáyah, vol. i, page 245.

Intention is necessary to give effect to the word 'choose;' and if the wife should choose herself on his saying "choose," a single irrevocable divorce would take place; and it would not be triple, even though the husband would have intended it.—Fatáwá Alamgírí, vol. i, page 543.—B. Dig., page 238.

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ccclix. When a man has said to his wife "choose," intending repudiation thereby, or "repudiate thyself," she may repudiate herself at any time while she remains at the meeting, though she should prolong it for a day or more, by not rising from it or betaking herself to some other matter; and though he should rise from the meeting, the matter is still in her hands so long as she continues at it herself, and it is not in his power to revoke the option he has given her, nor to prevent her from exercising it, nor to cancel what she may do under it.—Fatáwá Alamgírí, vol. i, page 542.—B. Dig., pp. 236 & 237.

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* Arabic—'Majlis' meeting or assembly.

† This is an idiomatical phrase in the Arabic, signifying [illegible] she chooses her liberty from the matrimonial tie.

CCCLX. It is further necessary to give effect to the repudiation that the word 'self' or the word 'repudiation' should be combined with the word 'choose' on one side or the other; either by the husband's saying "choose thyself," or "choose repudiation," or "choose a choice," or by the wife's saying—"I have chosen myself," or "I have chosen repudiation," or "I have chosen a choice," whereupon repudiation would take place. And if he were merely to say "choose," and she were to say I have "chosen," nothing would take place.* *Principle.*

If a man say to his wife "choose," and she reply "I have chosen myself," divorce takes place, where such was the husband's intention; because the word 'self' here occurs in the reply given by the woman, and the expression of the husband bears the construction of that which he intended.—Hidáyah, vol. i, page 247.

If a man say to his wife "choose yourself," and she answer "I have chosen," a divorce irreversible takes place; because the word 'self' here occurs in the words of the husband, and the words of the woman are in reply to him; and hence her words virtually comprehend "herself." And, in the same manner, if the husband were to say "choose an option," and she reply "I have chosen," a divorce irreversible takes place.—Hidáyah, vol. i, page 247.

If a man should say to his wife "choose," and she should say "I choose myself," she would be repudiated on a favorable construction. If she were to say "I have separated myself," or "made myself unlawful," or "repudiated myself," the answer would be sufficient, and repudiation would take effect.*

If the choice be given in connection with the word talák (repudiation), as if he were to say "choose talák," and she should say "I have chosen talák," there would be one revocable repudiation.*

If her words were "I have chosen a choice," or "the choice," or "once," or "for once," or "one," there would be three according to them all. So, also, if her words

* Fatáwá Álamgíri, vol. i, pp. 543, 544 & 545.—B. Dig., pp. 238 & 239.

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were "I have repudiated myself," or "I am repudiated," it would be deemed an answer as to the whole, and she would be repudiated three times.*

Principle. CCCLXI. Where the husband gives the power of option thrice repeated,† and the wife make only a single reply, yet three divorces take place from it independent of the husband's intention.

And so, also, if she were to reply "I have chosen a choice." This is admitted by all the doctors; because, where she only says "I have chosen," it is productive of three divorces; and consequently when she speaks in a way to give this additional force, it produces the same *á fortiori*. And if she were to reply "I have divorced myself," or "I have chosen myself with respect to one divorce," one divorce reversible takes place.—Hidáyah, vol. i, page 248.

Principle. CCCLXII. If a man say to his wife, "one divorce is at your option," or "choose with respect to a single divorce," and she reply "I have chosen myself," one divorce reversible takes place, because the man has given the woman an option so far as one divorce, and expressing it in direct terms (as above) the divorce proceeding from it is reversible.—Hidáyah, vol. i, pages 248 & 249.

Principle. CCCLXIII. If he (the husband) should mention 'three' in choice, as by saying "choose three," and she were to say "I have chosen," it would take effect three times. So, also, if her words were "I have repudiated myself," or "I am repudiated," it would be deemed an answer as to the whole, and she would be repudiated three times.*

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* Fatáwá Alamgírí, vol. i, pp. 542 & 547.—B. Dig., Pp. 239 & 241.

† As "Choose,—Choose,—Choose."

CCCLXIV. A man gives his wife an option, and before she can exercise it takes her by the hand and raises her up standing, or has matrimonial intercourse with her, with or against her will, the option is at an end.* *Principle.*

The delegation of liberty† is like the delegation of option or choice (ikhtíar) in requiring the use of the word "self," or some substitute for it, and as to the husband's having no power to recall the authority given to the wife, and in all other respects, except that intention to give three repudiations is valid in this case.* *Principle.*

CCCLXV. If a man say to his wife "your business is in your hands,"† intending three divorces, and the woman answer "I have chosen myself with one choice," three divorces take place (*a*).—Hidáyah, vol. i, page 249. *Principle.*

If the woman were to reply "I have divorced myself with one divorce," or "I have chosen myself by one divorce," one divorce only takes place; and this divorce is irreversible although the reply be delivered in express, and not in ambiguous, terms, because it bears relation to the words of the husband, which being an implication amount to a delegation of irreversible divorce, and not reversible.—*Ibid.*

If a man should say "thy business is in thy hand,"† intending three repudiations, and she should say "I have chosen myself with one," still there would be three repudiations; and if she should repudiate herself thrice, there would be three; though if he intended two, there would be but one. In like manner if she should say "I have repudiated myself," and "have chosen myself," without saying "thrice," still there would be three repudiations; so also if she had said "I have separated myself," or "rendered myself unlawful," or used other expressions suitable to express assent. When a woman has said "I

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* Fatáwá Alamgírí, vol. i. pp. 542 & 547.—B. Dig. pp. 237 & 241.

† Arabic "Amru-kibi-yadi-ki" your business is in your hands, that is, you are at libert, to do as you please. The word liberty is adopted singly for the sake of brevity.

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have repudiated myself once," or "have chosen myself by one repudiation," it is one irrevocably.*

Principle. CCCLXVI. When a man has put his wife's business in her hand and she has chosen herself at the meeting, where she is made acquainted with the fact, she is repudiated once; and if her husband has intended three repudiations, there are three, but if he intended two, or one, or had no particular intention, there is only one repudiation.*

Principle. CCCLXVII. The delegation of liberty may be restricted to a particular time or several different specified periods of time, or extended to a month, year, and so forth, it is not annulled by the rejection of it, until the time or times mentioned be fully expired.—*Vide* Hidáyah, vol. i, page 250.

If a man say to his wife "your business is in your own hands to-day and to-morrow," the night is comprehended in it; and, if the woman should reject the liberty on the instant, it is totally annulled, and does not return on the morrow.—Hidáyah, vol. i, page 250.

Principle. CCCLXVIII. If a man should say to his wife "thy business is in thy hand a day," or "a month," or "a year," or "the day," "the month," or "the year," or "this day," "this month," or "this year," her option would not be restricted to the meeting, but might be exercised whenever she pleased during the period indicated.*

And if she were to rise from the meeting, or take to some other employment without answering, her option would not be cancelled, so long as there remained any part of the time without any difference of opinion.*

Principle. CCCLXIX. A wife may signify her wish to consult her friends without prejudice to her right of option.—*Vide* Hidáyah, vol. i, page 254.

* Fatáwá Alamgíri, vol. i, pp. 547 & 549.—B. Dig., pp. 241 & 243.

CCCLXX. When a woman's business has been given into her hands, and she has said "I have accepted myself" she is repudiated; so also if she have said "I have accepted it."* *Principle.*

CCCLXXI. When a husband has not intended to repudiate by the words "thy business in thy hand" they are of no avail, except when uttered in anger or in conversation regarding divorce.* *Principle.*

A man places the business of his wife in her hands, and she says to her husband "thou art unlawful to me," or "are separated from me," or "I am unlawful to thee," or "separated from thee," repudiation takes effect. But if '*to thee*' and '*from thee*' were omitted in the two first expressions they would be void; while their omission in the two last would not have the same effect, and repudiation would follow.*

If a man should put his wife's business in her own hand or in that of a stranger, and should then become insane, that would not invalidate the authority though continued.*

CCCLXXII. When a man has said to his wife "repudiate thyself," (whether he say if you please or not), she may repudiate herself at the meeting, and he cannot divest her of the power. And when the words are—"repudiate yourself when you please," she may repudiate herself at the meeting or after it, and has one option; but if the words *Principle.*

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ccclxxii. If a husband say to his wife "divorce yourself when you please," she is at liberty to divorce herself upon the spot or at any future period, because the word 'when' extends to all times, and hence it is the same as he were to say—"divorce yourself at whatever time you like".—Hidáyah, vol. i, page 257.

* Fatáwá Alamgírí, vol. i, page 548 *et seq.*—B. Dig., pp. 242, 243 & 245.

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were—"Whenever," or "as often as," the power will continue in force till exercised three times.*

If a husband say to his wife "divorce yourself," he is not at liberty to retract as his expression involves a vow, because he has, in this instance, suspended divorce upon the execution of it by his wife, and a vow is an obligatory act, for which reason a man is not allowed to recede from it. If, however, the woman rise from her seat, or remove from the place, the words of the husband as above, transferring the power of divorce to her, are annulled, their force being confined to the situation where the offer is made.—Hidáyah, vol. i, pages 256 and 257.

There can be no more than three divorces effected, even though a thousand be repeated. Thus, if a husband says to his wife "I repudiate you by a thousand divorces," three divorces take place, because he has pronounced that to which he is empowered along with that to which he was not empowered, consequently the former takes effect, but the latter is nugatory.—*Vide* Hidáyah, vol. i, page 258.

If a man says to his wife "a thousand repudiations to thee," three repudiations take place.*

A general *Principle.*

CCCLXXIII. The words "repudiate thyself" addressed to a wife are sufficient authority for her to do so. The repudiation or repudiations given by her to herself should be in the same mode or form as desired by him. As to the number of the repudiation or repudiations it should be equal to, or may be less than, what was directed or intended by him. Should the wife, nevertheless, give to herself more

ANNOTATIONS.

* cccLxxiii. If a man desire his wife to repudiate herself by a reversible divorce, and she divorce herself irreversibly, or the contrary, *that* mode of divorce takes place which was desired by the husband.—Hidayah, vol. i, page 259.

* Fatáwá Alamgírí, vol. i, pp. 564 & 565.—B. Dig., pp. 235 & 252.

repudiations than she was directed, still the number intended by the husband will be effected. In the case, however, of the wife's giving two repudiations according to her husband's direction or intention only one will take effect. But if the wife gave herself repudiations more in number than what was desired or intended by the husband, then no repudiation will take place according to Abú Hanífah, though one according to his disciples.—*Vide* Fatáwá Alamgírí, vol. i, page 564 *et seq.*—B. Dig., pages 252, 253 *et seq.*, and Hidáyah, vol. i, page 258.

Divorce by commission or agency.

CCCLXXIV. A commissioner or commissioners as well as an agent or agents may be appointed by a man to divorce his wife.

Principle.

CCCLXXV. Joint commissioners cannot act separately; but joint agents can unless restricted.*

If a man should say to two others "repudiate ye my wife, if you please," one of them cannot repudiate her separately without the other; but if he should not add the words "if you please," it would be an agency, and one alone of them is competent to repudiate without the concurrence of the other.*

Principle.

CCCLXXVI. A general agency does not authorize the agent to repudiate unless the appointment be in the most comprehensive terms. The agent to repudiate must act according to his instructions.

When a man has said to another "I appoint you my agent for all my affairs," and the agent has repudiated his wife, authorities differ with regard to such a repudiation, but the correct opinion is that it is not valid. But if the words of appointment were "I have made you my agent in all my affairs in which agency is lawful," the power would be general for sales, marriages, and everything else.**

When the appointment is to repudiate a wife once, and the agent gives her two repudiations, it is not lawful

* Fatáwá Alamgírí, vol. i, pp. 566, 571.—B. Dig., pp. 254 & 255.

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according to Abú Hanífah, but according to the other two, one repudiation takes effect. A man says to another "repudiate my wife revocably," and he gives her an irrevocable repudiation, one takes effect, but it is revocable; and if the agent had said "I have separated her," it would be nugatory.*

Principle. CCCLXXVII. An agent and messenger for repudiation are alike, and cannot be compelled to repudiate.

A man says to another "repudiate this my wife," and the agent accepts, and the man goes away (is absent), the agent cannot be compelled to repudiate. An agent and a messenger for repudiation are alike. A message to repudiate is when a husband sends a repudiation to his absent wife by the hand of a person, and if the messenger should go to her and deliver the message to her face, repudiation would take effect.*

Principle. CCCLXXVIII. If a man should say to another, "my wife's business is in your hand for a year," it would be so for a year; and the authority could not be recalled by the husband, but would expire of itself on the completion of the year. When a man says to a stranger "my wife's business is in your hand," it is limited to the meeting, and he has not the power of recalling it while the meeting lasts.*

If a man should say to another "repudiate my wife, as I have already committed this to thee," it would be a discretion restricted to the meeting which the husband might recall; and if the person should repudiate her at the meeting, the repudiation would be single and revocable. So, also, if she should say to the person "I have given to thee her repudiation, so repudiate her," the power would be restricted, and repudiation revocable.*

If the authority were given to a youth under puberty, or to an insane person, or to a slave, or to an infidel, it would remain in his hands till his rising from the meeting, in the same way as if the authority had been given to the wife herself; and if he were to say to his wife, she being under

* Fatáwá Alamgírí, vol. i, pp. 571 & 572.—B. Dig., pp. 244, 245, 255 & 256.

puberty, "thy business is in thy hand," intending repudiation, and she should repudiate herself, it would be valid, and the repudiation take effect. A man put his wife's business in the hand of her father, and he said "I have accepted her," repudiation took effect.* LECTURE XIII.

CCCLXXIX. If an authorized person (*Fazúlí*) says to the wife of another person "I have put your business into your hand," whereupon she says "I have chosen myself;" and on the intelligence reaching her husband he allows the whole matter, yet she is not repudiated, but her business is placed in her hands by the allowance of her husband for the meeting at which she may receive the intelligence of his allowance.* *Principle.*

CCCLXXX. If a person should say "The wife of Zayid is repudiated," and Zayid should say "I have allowed," or "I am content," or "I have made it obligatory upon myself," repudiation would become obligatory.* *Principle.*

CCCLXXXI. And in like manner if the wife should say to herself "I have put my business into my hands, and have chosen myself," and the husband should allow the whole matter, repudiation would not take effect, but the business would be in her hands by his allowance; while if she should say "I have put my business in my hand, and have repudiated myself," and her husband should allow this, one revocable repudiation would take effect on the instant, and her business would be in her hands, so that if she should then say "I have chosen myself," another irrevocable repudiation would take effect.* *Principle.*

CCCLXXXII. If a wife should say "I have chosen myself," and her husband should say "I have allowed it," there would be no repudiation even though he intended it. But if she should say "I *Principle.*

* Fatáwá Alamgírí, vol. i, pp. 549 & 550.—B. Dig., pp. 245 & 246.

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have separated myself," and he say "I have approved," it would take effect when intended.*

Principle.

CCCLXXXIII. And if a husband should say "I have sold to thee thy business into thy hand for a thousand *dirms*," and she should make choice of herself at the meeting, it would be a repudiation, and she would be liable for the money.*

There are two other modes of separation—one of which is by the husband's making oath accompanied by an imprecation (*lián*) as to his wife's adultery, and the other is his vowing (*ílá*) not to have carnal connection with his wife and observing the vow inviolate.

Principle.

CCCLXXXIV. If a husband charge his wife with adultery and deny his having begotten the child then conceived in her, or born of her, the charge is investigated by the *Kází*, who upon proof thereof issues a decree of separation between the husband and wife, and thus their marriage is dissolved. The separation so effected is an irreversible divorce.†—See *ante*, pages 371 and 372.

Of lián.

Principle.

CCCLXXXV. When a man makes a vow not to have carnal connection with his wife for no less than *full* four months and observes it inviolate, a divorce irreversible is thereby effected independent of any decree of separation from the *Kází* (Judge).‡

Of ilá.

If a man in case of *ílá*§ have carnal knowledge of his wife within four months after he is forsworn in his vow, and

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* Fatáwá Alamgírí, vol. i, pp. 548 & 549.—B. Dig., pp. 245, 246 & 247.

† *Vide* Macn. M. L., Chap. VII, Princ. 29.

‡ A vow of abstinence made by a husband, and maintained inviolate for a period of four months, amounts to an irreversible divorce.—Macn. M. L., Chap. VII, Princ. 27.

§ 'Ilá' in its primitive sense signifies a vow. In law it implies a husband swearing to abstain from carnal knowledge of his wife for any time above four months if she be a free woman, and two months if she be a slave.—Hamilton's Hidáyah, vol. i, page 306.

Ilá is a husband's prohibition of himself from approaching his wife for four months when he is a free man, and two months when he is a slave, the prohibition being confirmed by a yamín or vow, either by God, or without him.—Fatáwá Alamgírí, vol. i, page 698.—B. Dig., page 294.

expiation is incumbent upon him, this being incurred by the breach of his own, the ílá drops as his vow is cancelled by the breach of it; but if he have not carnal knowledge of her for the space of four months a divorce irreversible takes place independent of any decree of separation from the Magistrate.—Hidáyah, vol. i, page 306.

Established impotency is also a ground for admitting a claim of separation on the part of the wife.

Principle.

CCCLXXXVI. If a husband be *Innín* (impotent), it is requisite that the *Kází* (Judge) appoint the term of one year from the period of litigation within which if the accused have carnal connection with his wife it is well; but if not, the *Kází* must pronounce a separation, provided such be the desire of the wife (*a*).*—Hidáyah, vol. i, page 354.

Of impotency.

(*a.*) An impotent person is one who is unable to have connection with a woman, though he has the natural organs; and a person who is able to have connection with an enjoyed woman, but not with a virgin, or with some women, but not with others, whether the disability be by reason of disease, or weakness of the original constitution, or advanced age, or enchantment, is still to be accounted impotent with respect to her with whom he cannot have connection.—Fatáwá Alamgírí, vol. i, page 707.—B. Dig., page 345.

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cccLxxxvi. When a woman brings her husband before the Judge and sues him demanding a separation on the ground of impotency, the Judge is to ask him if he has had intercourse with her or not; and if he should admit that he has not had intercourse with her, the case is to be adjourned for a year, whether the wife be an enjoyed woman or a virgin. If the husband should deny the charge alleging that he has had intercourse with her, and she is an enjoyed woman, his word is to be taken, accompanied by his oath that he has had intercourse with her; and if he should swear to that effect her right is void; but if he refuse to

* *Vide* Macn. M. L., Chap. VIII, Princ. 30.

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(*a.*) The separation here mentioned amounts to the execution of a single divorce irreversible, because the act of the *Kází* is attributed to the husband, whence it is the same as if he had himself pronounced such a sentence upon her.—Hidáyah, vol. i, page 355.

Principle. CCCLXXXVII. The year of probation appointed by the *Kází* in cases of impotence is counted by the lunar calendar (from the date of litigation); and the days of the courses and of religious feasts (such as *Rumzán*) are therein included (*a*).—Hidáyah, vol. 1, page 357.

(*a.*) As these occur in all years alike, nor can a year pass without them; but the days of sickness of either party are not included, as a year may pass exempt from such an occurrence.—*Ibid.*

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swear the case is to be adjourned for a year. If she should allege that she is still a virgin an inspection by women is to be ordered, for though one woman is sufficient, yet an inspection by two is more cautious and more to be relied on. If they should declare her to be an enjoyed woman the word of her husband is to be taken with his oath; and if he should swear her right is void; while if he refuse the case is to be adjourned for a year. If they should declare her to be a virgin, her word as to non-intercourse is to be received without oath. When the fact is ascertained that there has not been any intercourse between the parties the Judge is to adjourn the case for a year, whether the man require it or not, and to take witnesses to the fact of the adjournment and write down the date.—Fatáwá Alamgírí, vol. i, p. 707.—B. Dig., pp. 345 & 346.

cccLxxxvii. The year is to commence from the time of litigation, and there can be no proper adjournment except by the Judge of the town or city, no regard being paid to postponements by the parties themselves without the intervention of a Judge. The adjournment is to be regulated by the lunar year according to the Záhir Rawáyat, confirmed by the *Hidáyah*; but there are several other authorities in favor of computation by the solar year; while Kází Khán and Zahí-ud-dín were of opinion that computation by the solar year is allowable by way of precaution, and according to the Khulásah the fatáwá is so.—Fatáwá Alamgírí, vol. i, page 707.—B. Dig., page 346.

CCCLXXXVIII. Where the term of a year is appointed for the trial of a man charged with impotence by a wife whom he had married as a virgin, and he declares, at the expiration thereof, that he has had carnal connexion with her within that interval, and she denies this, she is then to be examined by some of her own sex: if they pronounce her to be still a virgin, she has it at her option either to separate from her husband, or to continue with him.

Because the testimony of the examiners is confirmed by her virginity, that being the original state of every woman; but should they declare her muliebrity, the husband is then to be required on the other hand to make oath, which if he decline, she has an option as above, her plea being strengthened by the circumstance of his declining to swear; but if he swear she has no option.—Hidáyah, vol. i, page 356.

CCCLXXXIX. If, moreover, she was a *Sayyibah** originally (that is at the time of marriage), and the husband declare that he has had carnal connexion with her within the year of probation, and she deny

Principle.

ANNOTATIONS.

cccLxxviii, cccLxxix. When the period has expired, and the woman comes again to the Judge alleging that her husband has not had connection with her, while he asserts that he has had it, then, if she were at first an enjoyed woman, his word is to be taken with his oath, and if he should swear her right is void, but if he refuse to swear the Judge is to give her an option. If she should choose a separation the Judge is to order the husband to repudiate her, and if he refuse the Judge himself is to pronounce the separation. The separation is one irrevocable repudiation, and the woman is entitled to her full dower, and is under an obligation to keep *iddat* if there had even been a valid retirement; but if her husband had never retired with her there is no *iddat*, and she has only half the dower if any had been named, or a *mutat* (or maintenance) if one was mentioned.†

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* A woman who has already had carnal connection with a man.

† Fatáwá Alamgírí, vol. i, page 708.—B. Dig., page 347.

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this his declaration upon oath is to be credited, that is to say, the oath is to be tendered to him, which, if he take, she has no option.

But if he decline it she has then an option as already stated. And here if she choose to continue with him she has no subsequent option, as by so doing she manifests an assent to the relinquishment of her right.—Hidáyah, vol. i, pages 356 & 357.

Principle. CCCXC. If the prescribed period has passed, and the woman delays for a time to bring the matter again before the Judge, her right is not cancelled, even though they should have mutually agreed to lie together during the interval.*

But if the man should ask the Judge to extend the time for another year, or a month, or more, it is not competent for him to do so without the consent of the woman, and though she should consent she may retract, whereupon the fresh period is to be cancelled, and the choice again given to her.*

Principle. CCCXCI. If intercourse should once have taken place between married parties, though the husband should subsequently become weak, the wife has no choice; and if she knew at the time of the marriage that the man was impotent and unfit for women she has no right to raise the question afterwards (*a*).*

(*a*). But if she did not know it at the time, and only afterwards became aware of it, she is entitled to raise the question, and her right to dispute it is not cancelled, however long the time may be till she is dissatisfied with her condition. When the husband of a female slave is impotent, the option of separation is with her master according to Abú Hanífah, and the *fatwá* is so.*

Principle. CCCXCII. The wife, in the case here mentioned, is entitled to her whole dower, if the husband

* Fatáwá Alamgírí, vol. i, page 709.—B. Dig., pp. 347 & 348.

should ever have been in retirement with her, because retirement with an impotent man is accounted a khalwat-i-sahíh, or complete retirement, as well as with any other person; and an *iddat* is incumbent upon her.—Hidáyah, vol. i, page 355.

CCCXCIII. As time is allowed to an impotent man, so also the case of an eunuch is to be adjourned in the same manner; also that of an old man, though he should say that he has no hope of having intercourse with her.* *Principle.* Of an eunuch and old man.

CCCXCIV. When a wife has found that her husband is a *majbúb*,† she is to be allowed option at once without any adjournment of the case. But if a man had once intercourse with his wife, and is subsequently made a majbúb, she has no option; nor if she were aware at the time of her marriage that he was a majbúb.* *Principle.* Of majbúb.

CCCXCV. If the husband be lunatic, leprous, or scrofulas, yet his wife has no option, as in cases where he is an eunuch or impotent.—Hidáyah, vol. i, page 358. *Principle.*

CCCXCVI. If the madness be occasional, the case is to be adjourned for a year, at the expiration of the year if the madness is not cured the woman has an option; and that if the madness be continued, the case is like that of a *majbúb*.* *Principle.*

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cccxcvi. But Muhammad has said that if the madness be occasional, the case is to be adjourned for a year like that of an impotent person; and if at the expiration of the year the madness is not cured the woman has an option; and that if the madness be continued, the case is like that of a majbúb, and we have adopted this opinion.*

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* Fatáwá Alamgírí, vol. i, pp. 710 and 711.—B. Dig., pp. 348 & 349.

† One whose organs of generation have been cut clean away.

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Principle. CCCXCVII. When the wife of an impotent man has herself a physical obstruction to generation* there is to be no adjournment.†

Of the ambiguous expressions used to utter repudiation, there are some which effect a single revocable or irrevocable divorce, some which effect two divorces, and others which effect three divorces. The principal of them are as follows:—

Principle. CCCXCVIII. Of the ambiguous or implicative expressions, only three (*viz.* 1—"Count;" 2—"Purify your womb;" and 3—"Thou art single"‡) effect one revocable or reversible repudiation, though more be intended by the divorcer.—*Vide* Hidáyah, vol. i, page 235.

Principle. CCCXCIX. The other ambiguous or implicative expressions effect either one irrevocable repudiation, or three repudiations, if intended, but not two, though intended. The principal of these are thus translated in Hamilton's Hidáyah: "4—You are separated; 5—You are cut off; 6—You are prohibited; 7—The reins are thrown upon your own neck; 8—Be united unto your people; 9—You are

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cccxcvii. When a defect is found in a wife the husband has no option, nor a wife any option when her husband has madness, or leprosy, or elephantiasis.†

If the defect be on the part of the *woman*, the husband has no right to annul the marriage.—Hidáyah, vol. i, page 357.

* The Arabic words rendered by physical obstruction to generation are "Ratk," which is *vulva impervia cæunti*, and "Karn" which is a bone or natural excrescense, *vulva anteriore parte enascens.*—See Hidáyah, vol. i, page 357.

† Fatáwá Alamgírí, vol. i., page 711.—B. Dig., pp. 348 & 349.

‡ As the original of each of these words has a peculiar force or effect, which it is impossible to express in translation, it is deemed advisable to give consecutively the original words of which the above are translations. They are these: 1—"Itaddí; 2—istabrí rahima-ki; 3—anti wáhidatun; 4—anti báïnun; 5—battatun wa batlatun; 6—harámun; 7—hablu-ki alá gháribi-ki; 8—ilhakí bi ahli-ki; 9—khalíatun wa baríatun; 10—wohabtukili

devoid; 10—I give you to your family; 11—I set you loose; 12—Your business is in your own hands; 13—You are free; 14—Veil yourself; 15—Be clean; 16—Go forth; 17—Go to; 18—Go; 19—Arise; 20—Seek for a mate" (*a*).—Hidáyah, vol. i, page 236.

(*a.*) The kináyát, or ambiguous expressions, considered with regard to the kind and number of repudiations effected by them, may be divided into two classes. The first comprises the following:—"Count, purify your womb," and "thou art single;" and one revocable repudiation is effected by them, and no more than one, even though three or two, should be intended.*

All the remaining ambiguous expressions are comprised in the second class, and by (each of) them one irrevocable repudiation is effected, and one only, even though two repudiations should be intended. But if three be intended, the intention, though not valid as to *two*, would be valid as to three.*

The Compiler of the Hidáyah observes that implication is of two kinds:—the first is that from which a single divorce reversible (or revocable) takes place, and this consists of three forms of words, to wit—"count, seek the purification of your womb," and "you are single." And from all other implications of divorce, besides those where divorce is the husband's intention, a single complete (or irreversible) divorce takes place; or if he intended three divorces, three divorces take place; or if two, one† divorce takes place.—*Vide* Hidáyah, vol. i, pages 236 & 335.

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ahlu-ki; 11—surrahtu-ki wa fáraktu-ki; 12—amru-ki bi yadi-ki wa ikhtárí; 13—anti hurratun; 14—takannaí wa tukhammarí; 15—istabrí; 16—ighrabí; 17—ukhrují; 18—izhabí; 19—kúmí; 20—ibtaghí al-azwája."—Hidáyah, Arabic, Lucknow Edition, vol. ii, pp. 254 & 255.

* Fatáwá Alamgírí, vol. i, page 528.—B. Dig., page 230.

† Here the word *two* is used in Mr. Hamilton's translation, but *one* is to be found in the original Hidáyah, as well as in Fatáwá Alamgírí, and other books.

The reason why intention is not good as to *two*, but good as to *three*, seems to be that in the former case there would be an addition of one repudiation to another, and the expressions being in the singular are inapplicable to more than one repudiation, while in the other case there would be only an aggravation of the irrevocable repudiation.—Hidáyah, vol. ii, page 192. See *ante*, pp. 387 & 388.

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Principle.

CCCC. If a man *thrice* utter to his wife the word 'count,' three divorces would take place, though he should confess that in the two last he had no particular intention. But if he declare that he had no intention to divorce in any of the three words, divorce does not take place at all (*a*).

(*a*.) If a man say to his wife "count, count, count," and afterwards declare that by the first of these words he meant divorce, and by the others the repetition of the woman's courses [requisite to its completion] his declaration is credited in point of law, as he appears to have intended these last words in their true sense, it being customary for a husband, where he divorces his wife, to desire her to count the courses necessary to the completion of her *iddat*, and hence apparent circumstances bear evidence to his intention: but if he were to confess that in last these words he had no particular intention three divorces take place, because, from his intending divorce by the first word, it follows that he repeated it a second and third time.—Hidáyah, vol. i, page 243.

Principle.

CCCCI. If a husband say to his wife "you are under three moieties of two divorces," three divorces take place.—*Ibid.*, page 216.

Principle.

CCCCII. If a man say to his wife "you are under divorce from *one* to *two*," or "between one and two," in this case one divorce takes place; and if he were to say "from one to three," or "between two and three," two divorces take place. This is the

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ANNOTATIONS.

cccc. If a man says to his wife "count, count, count," and declares that he means by the whole only one repudiation, though the assertion may be good as between him and his conscience, it cannot be admitted judicially, and three repudiations take effect. But if he should say "count three," and allege that by 'count' he meant a repudiation, and by 'three' three counts, the allegation would be received judicially. And if the words were "count three count," or "count and count," or "count, count," and repudiation were intended, two would take effect judicially.—Fatáwá Alamgírí, vol. i, p. 531.—B. Dig., pp. 231 & 232.

doctrine of Abú Hanífah. The two disciples assert that by the first form two divorces take place, and by the last three.—Hidáyah, vol. i, p. 217.

Principle. CCCCIII. If a man say to his wife "you are under divorce thus," holding up his thumb and fore and middle fingers, three divorces take place.—*Ibid.*, page 228.

Because from holding up the fingers number is customarily understood, where the sign is associated with relation to number, and the word 'thus' is of this kind; and the fingers held up are three in number, whence three divorces are to be understood.—*Ibid.*

Principle. CCCCIV. If the sign be given with one finger a single divorce takes place: if with two fingers two divorces (take place).—*Ibid.*, page 228.

It is to be observed that the sign is to be understood from the fingers which are extended, and not from those which are clenched.—*Ibid.*

Principle. CCCCV. If a man compares his wife to any of his female relations within such prohibited degree of kindred, whether by blood, or by fosterage, or by marriage, as renders marriage with them invariably unlawful, or to any of the parts of her person improper to be seen, then the intention of the husband must be examined into; and if he declare that his intention by such comparison was *divorce*, a divorce irreversible takes place; or that he meant only to show respect to his wife, it should be received to be so; or that it was meant to be a *Zihár* (*a*) that should be taken to be established; but if he declare that he had no positive intention, neither Zihár nor divorce is established (*b*).—*Vide* Hidáyah, vol. i, page 329.

Of Zihár.

(*b.*) Zihár signifies the likening of a woman to a kinswoman within the prohibited degrees, which interpretation is found in the comparison being applied to any of the parts or members improper to be seen.—Hidáyah, page 328.

LECTURE XIII.

Where a man says to his wife "you are to me like my mother," it is requisite that his intention be examined into, so as to discover the true predicament in which the wife stands; and if he declare that his meaning was only to show respect to his wife, it is to be received according to his explanation; because in speech respect may be expressed by a general comparison; or if he declare his intention to have been Zihár* that is accordingly established.†—Hidáyah, vol. i, page 329.

The effect of the express terms of repudiation is as follows:—

Principle. CCCCVI. If a man say to his unenjoyed wife, "you are divorced once and again if you enter the house," and she afterwards enter it, two divorces take place upon her according to all.—*Vide* Hidáyah, page 234.

Principle. CCCCVII. If a man say to his unenjoyed wife, "you are divorced once before once," or "once and after that again," a single divorce takes place; but if he were to say "you are divorced once, and previous thereto once," two divorces (take place); and so also if he were to say "you are divorced once after once.*—*Ibid.*

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* The word 'Zihár' is derived from *Zihr*, the back. In the language of the law it signifies a man comparing his wife to any of his female relations within such prohibited degree of kindred, whether by blood, by fosterage, or by marriage, as renders marriage with them invariably unlawful,—as if he were to say (to her by a peculiarity in the Arabic idiom,) "you are to me like the back (Zihr) of my mother." It is essential to Zihár that the person compared be the wife of the speaker, in so much that Zihár does not apply to a female slave; and competency to pronounce Zihár appertains only to one who is a Mussulmán, of sound mind and mature age, that pronounced by a Zimmí or an infant being nugatory; and its effect is to prohibit the person who pronounces it from carnal connection with his wife, until he shall have performed an expiation.—Hidáyah, vol. i, page 326.

In times of ignorance Zihár stood as a divorce, and the law afterwards preserved its nature (which is prohibition), but altered its effect to a temporary prohibition, which holds until the performance of expiation.—Hidáyah, vol. i, page 327.

† The term 'choose' also is one of the implicative terms of divorce, and so is the expression 'your business is in your hands.' These, however, have been commented upon in the Section treating of the husband's delegation of divorce to his wife. See *ante*, pp. 395—400.

CCCCVIII. The rule in these cases is that, when *that* which is first uttered takes effect first, there is but one repudiation, and when that which (is first) uttered is the second of taking effect there are two repudiations.* *Principle.*

CCCCIX. If a husband say to his wife "you are divorced twice by twice," intending the multiple, yet no more than two divorces take place.—Hidáyah, page 218. *Principle.*

CCCCX. An express repudiation may be added to another express one as if a person should say (to his wife) "thou art repudiated," whereupon one repudiation would take place, and should then say "thou art repudiated," when another would take effect. So, also, an express repudiation may be added to one that is irrevocable.* *Principle.*

CCCCXI. But if he were to say "I intended to make a *ghalíz* (aggravated) irrevocable† repudiation" regard must be paid to his allegation, and an aggravated illegality would in consequence be incurred.* *Principle.*

CCCCXII. If a man say to his wife "you are under three divorces all but one," two divorces take place; and if he say "all but two," one divorce takes place.—Hidáyah, vol. i, page 278. *Principle.*

*For it is a rule that this figure of speech termed 'istisná' (exception) is expressive of a remainder from the whole of a given number from which an exception is made, and this is approved.—*Ibid.*

CCCCXIII. If the woman were to reply "I have divorced myself with one divorce," or "I have chosen *Principle.*

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* Fatáwá Alamgíri, vol. i, pp. 526, 532.—B. Dig., pp. 226—232.

† There are two kinds of irrevocable repudiation: the 'khafíf' or light, and 'ghalíz' or aggravated, which is triple and prevents marriage, before the woman was married to another husband, who died, or divorced her after consummation.—See pp. 443 and 444.

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myself by one divorce," one divorce only takes place; and this divorce is irreversible, although the reply be delivered in express, and not in ambiguous, terms.

Because it bears relation to the words of the husband, which being an implication amount to a delegation of irreversible divorce, and not of reversible.—Hidáyah, vol. i, page 249.

Principle. CCCCXIV. If a man say to his wife "one divorce is at your option," or "choose with respect to a single divorce," and she reply "I have chosen myself," one divorce reversible takes place.—Hidáyah, vol. i, page 248.

Principle. CCCCXV. If a man say to his wife "you are under divorce," or "you are divorced by divorce," or "you are divorced according to divorce" without any particular intention, or intending thereby one divorce, or two divorces, a single divorce reversible takes place, and if his intention be three divorces, a triple divorce takes place accordingly.—*Ibid.*, page 214.

Principle. CCCCXVI. If the husband were to say (to his wife) "you are completely separated," intending three divorces, three take place accordingly, where such is his intention.—Hidáyah, page 246.

Because this complete separation is of two descriptions—the mild and the rigorous, and it follows that intention with respect to one of these holds good.—*Ibid.*

Principle. CCCCXVII. If a man should give one repudiation to his wife being a free woman, and should then say to her "thou art absolutely separated" (báin), meaning thereby two repudiations, only one would take effect; but if he intend three, there would be three.* See *ante*, page 413.

* Fatáwá Alamgírí, vol. i, page 529.—B. Dig., page 230.

CCCCXVIII. If a man says to his wife "one divorce is at your option," or "choose with respect to a single divorce," and she reply "I have chosen myself," one divorce reversible takes place.—Hidáyah, vol. i, page 249. *Principle.*

Because the man has given the woman an option so far as one divorce, and expressing it in direct terms (as above) the divorce proceeding from it is reversible.—Hidáyah, vol. i, page 249.

CCCCXIX. When a man divorces a woman before cohabitation, by saying to her "you are divorced thrice," three divorces take place upon her, because he has here given three collectively; but if he pronounce the three separately, saying "you are divorced,—divorced,—divorced," one divorce irreversible takes place from the first, but nothing from the second or third.* *Principle.*

Because each repetition of the word divorce is a separate execution of divorce; and the first of them having already rendered the woman decisively and irreversibly divorced, it follows that the second and third cannot take effect upon her.* And it is the same where he says "you are divorced once and again," (where a single divorce takes place), because the woman becomes completely divorced by the first part of the sentence.—Hidáyah, vol. i, page 233.

CCCCXX. If a man add to the wording of repudiation, a word signifying vehemence, amplification, irrevocability, certainty, enormity, gravity; strong, the basest, worst, hardest, like a mountain, broad, long, or the like, one irrevocable or irreversible divorce always takes place, but sometimes two and sometimes even three divorces take place, if such be the intention of the divorcer and capability of the additional word *(a)*. *Principle.*

* See *ante*, pp. 387 & 388.

LECTURE XIII.

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* Fatáwá Alamgírí, vol. i, page 529.—B. Dig., page 230.

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* See *ante*, pp. 387 & 388.

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(*a.*) If a man give to the divorce, which he is pronouncing, a description of particular vehemence or amplification, as if he were to say "you are divorced irreversibly," or "you are divorced to a certainty," an irreversible divorce takes place, whether the wife whom he so addresses may have been enjoyed or not.—Hidáyah, vol. i, page 229.

If a man say to his wife "you are divorced irreversibly," or "you are divorced to a certainty," and intend by his words "you are divorced" to express one divorce, and by the additional words "irreversibly," or "to a certainty," another divorce, two divorces irreversible take place, as these expressions are of themselves capable of effecting divorce.—Hidáyah, vol, i, page 230.

If a husband say to his wife "you are under a most enormous divorce," a divorce irreversible takes place, because divorce is thus described only with a view to its effect in the immediate dissolution of the marriage, and hence the description of it by enormity is the same as by irreversibility. And it is the same if he were to say "a most base divorce," or "the worst kind of divorce;" and so also if he were to say "a diabolical divorce," or "an irregular divorce," because reversible divorce is restricted to those of the regular description, [or Talák-us-sunna,] and consequently all others are of an irreversible nature.—Hidáyah, vol. i, page 230.

If a man say to his wife "you are under a divorce like a mountain," a divorce irreversible takes place according to Hanífah and Muhammad. Abú Yusuf holds that the divorce is reversible, because a mountain is a single thing, and hence the comparison of divorce with a mountain gives the former a description of unity. The argument of the other two sages is, that simile in divorce is always used in an amplifying sense; and amplification implies irreversibility, whence a divorce irreversible is the effect.—Hidáyah, vol. i, pages 230 and 231.

If a man say to his wife "you are under a most vehement divorce," or "you are divorced like a thousand," or "a houseful," one divorce irreversible takes place, unless his intention be three divorces, in which case three take place accordingly.—Hidáyah, vol. i, page 231.

If a man say to his wife "you are repudiated by a heavy divorce," or "by a broad," or "by a long divorce," one divorce irreversible takes place; because a thing of which the reparation is impracticable is called heavy, and an irreversible divorce is of this kind, inasmuch as the reparation of it is difficult; and with respect to those things of which the reparation is difficult, it is common to say "they are long and broad."—Hidáyah, vol. i, page 232. *Vide* Fatáwá Alamgírí, page 524.—B. Dig., page 225.

CCCCXXI. The general rule with regard to the description of repudiation is, that if the description be such as is not applicable to repudiation, the description is to be treated as a mistake or redundant, and a revocable repudiation takes place.* —*Ibid.*

CCCCXXII. A woman can repudiate herself under authority from her husband delegated either by himself, or obtained by her at her own instance, and if she so repudiate herself, the number of divorces and the revocability or irrevocability thereof are ascertainable according to the husband's expression or intentions. *Principle.*

A woman says to her husband "repudiate me, repudiate me, and repudiate me," and the husband says "I have repudiated thee," this amounts to three repudiations, whether he means three or not; and if she had used the same expressions without the connective *wa* (and), as "repudiate me, repudiate me, repudiate me," and the husband had answered "I have repudiated thee," there would be three repudiations if he intended three, and only one, if he intended one or had no particular intention. If she should say "repudiate me thrice," and he should answer "thou art repudiated," or "then thou art repudiated," there would be only one repudiation; but if the answer were "I have repudiated thee," it would amount to three. A woman says to her husband "repudiate me," and he answers "thou art not my wife," it has been said that this effects a repudiation without the necessity of intention.

* Fatáwá Alamgírí, vol. i, page 52.—B. Dig. page 225.

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A woman says to her husband "repudiate me," and he answers "thou art single," she is repudiated once. Fatáwá Alamgírí, vol. i, page 502.—B. Dig. page 214.

It is almost impossible to say by way of a general rule as to how a revocable or an irrevocable divorce is effected, and when and how one, two, or three divorces take place. All that can be said on this point is, that—

Principle.

Recapitulation.

CCCCXXIII. The sentence of repudiation pronounced in the *ahsan* form always effects one divorce revocable (1);*—the repudiation given for the first time to an unenjoyed wife produces an irrevocable divorce, after which if any other is given to her the same has no effect, as being unnecessary (2);—if a word signifying similitude or comparison, worst, strongest or the like, is added to a phrase expressive of repudiation, it renders the latter an irrevocable divorce (3);—the ambiguous or implicative terms of repudiation, excepting three, produce, each, three divorces, if intended, otherwise, an irrevocable divorce (4);—and the separation caused by lián, ílá, impotency or the like (5), as well by khulá (6), effects one divorce irrevocable. As to the number of divorces taking place, it generally depends upon the number, or number of signs, or upon the expression or mode of expression used, as well as upon the husband's intention expressed or implied by the words used by him (7). There cannot be more than three repudiations, of which the first, as well as the second, if not irrevocable, completes the divorce *after* completion of the *iddat*, and the third is always irrevocable and completes the divorce without waiting for the expiration of the *iddat* (8), which must be observed in every kind or case of divorce.

(1) See *ante*, page 385.
(2) See *ante*, page 388.
(3) See *ante*, pp. 415 & 419.
(4) See *ante*, pp. 412 & 413.
(5) See *ante*, pp. 406—411.
(6) *Vide* page 424 *et seq.*
(7) See *ante*, pp. 402, 414, 415, &c.
(8) See *ante*, pp. 402, 417, 433.

The result of revocable and irrevocable divorces taking place is, that—

A general principle.

CCCCXXIV. In the case of an irrevocable divorce being effected by the first or second repudiation the husband can take back his divorced wife by remarrying her before or after the completion of the *iddat*, while in the case of a revocable divorce taking place he can retain or take her back without remarrying; but after the third divorce which becomes not only irrevocable but aggravated (mughallazah) he cannot take her back by remarrying her *immediately* after the divorce or completion of the *iddat*, but *after* she was married to another man and divorced by him after consummation, or was left a widow at his death.

All these will be treated of in detail in the following Lecture.

LECTURE XIV.

ON KHULÁ,* IDDAT,† RAJÁT,‡ AND REMARRIAGE OF A DIVORCED WIFE.

Principle. **CCCCXXV. In the event of disagreement between a husband and wife, and there being scarcely a hope of reunion, the latter, upon giving a property by way of compensation to her husband, may obtain from him an effective divorce, or release from the marriage tie (*a*).—This release is technically termed khulá.***

(*a.*) When married parties disagree, and are apprehensive that they cannot observe the bounds prescribed by Almighty God (or, in other words, perform the duties incumbent on them by the marriage relation), there is no objection to the woman's ransoming herself from her husband with property, in consideration of which he is to give her a khulá, and when they have done this, one irrevocable repudiation takes place, and she is liable for the property.—Fatáwá Alamgírí, vol. i, page 669.—B. Dig., page 304.

Whenever enmity takes place between husband and wife, and they both see reason to apprehend that the ends of marriage are not likely to be answered by a continuance of their union, the woman need not scruple to release

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* Khulá in its primitive sense means to draw off or dig up. In law it signifies an agreement entered into for the purpose of dissolving a marriage in lieu of compensation paid by the wife to her husband out of her property. This is the definition of it in the Jámi-ur-Ramúz.—Hamilton's Hidáyah, vol. i, page 313.

In common parlance, however, '*khulá*' is the release from the marriage tie obtained by a wife upon payment of a compensation or consideration.

† '*Iddat*' is a woman's abstinence from sexual enjoyment on the occasion of divorce, or dissolution of marriage caused by legal separation from her husband, or by his death.

‡ '*Raját*' is the retention or taking back of a wife revocably divorced.

herself from the power of her husband by offering such a compensation as may induce him to liberate her.—Hidáyah, vol. i, page 314. LECTURE XIV.

CCCCXXVI. If a husband offers to divorce his wife for a compensation, and she consents, divorce takes place, and she becomes answerable for the compensation. *Principle.*

Because the husband is empowered of himself to pronounce either an *immediate* or a *suspended* divorce, and he here suspends the divorce upon the assent of the woman, who is at liberty to agree to the compensation, as she has authority over her own person.—Hidáyah, vol. i, page 316.

CCCCXXVII. Where the compensation is thus offered and accepted, a single divorce irreversible takes place in virtue of khulá, and the woman is answerable for the amount of it.—Hidáyah, vol. i, page 314. *Principle.*

CCCCXXVIII. The compensation for khulá may consist of anything which is lawful for dower (*b*). *Principle.*

(*b.*) Whatever is capable of being accepted as a dower, is also capable of being accepted as compensation for *khulá.* Hidáyah, vol. i, page 318.

What is lawful for dower is lawful to be the exchange in *khulá.** See *ante,* pages 346 & 347.

ANNOTATIONS.

ccccxxvi, ccccxxvii. When a husband has repudiated his wife for property, and she has accepted, an irrevocable repudiation takes effect, and she is liable for the property.—Fatáwá Alamgírí, vol. i, page 677.—B. Dig., page 312.

A wife is at liberty with her husband's consent to purchase from him her freedom from the bonds of marriage.—Macn. M. L., Chap. vii, Princ. 28.

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* Fatáwá Alamgírí, vol. i, page 675.—B. Dig., pp. 305 & 310.

LECTURE XIV.

Consequently,—

Principle. CCCCXXIX. When a *khulá* has been entered into for wine, pork, carrion, or blood,* and the husband has accepted the terms, a separation is established between the parties, but none of the things specified is obligatory on the wife ; nor has she to restore any part of the dower (*c*).*

(*c.*) If the thing offered to the husband in return for *khulá* be not lawful property (as if the woman were to desire him to grant her *khulá* in lieu of wine or a hog, and he consent, saying "I agree to a *khulá* in lieu of such wine," or so forth,) a divorce irreversible takes place, but nothing is due to the husband.—Hidáyah, vol. i, page 316.

Principle. CCCCXXX. The *khulá* is effected generally by giving back the dower or a portion thereof, and sometimes by giving something else—either solely, or in addition to the dower.

When the aversion is on the part of the husband, it is not lawful for him to take anything from her in exchange for the khulá. But this is only as a matter of conscience; and if he should take it, the legal effect is valid notwithstanding, and she has no right to demand restitution of what she has given. And when the aversion is on her part, 'we' abominate his taking from her more than he gave her dower; but, notwithstanding, it is lawful for him judicially to take more.†

Principle. CCCCXXXI. If the wife has been enjoyed, but she has not as yet taken possession of the dower, then she is to relinquish her claim to the same ; if, however, the whole or any part of the dower has already been enjoyed by her, then she must give back the same if possible, otherwise property equivalent thereto, or the property which was stipulated to be given in exchange for the *khulá* (*d*).

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* These are no property with Mussalmáns. See *ante*, pp. 346 & 347.

† Fatáwá Alamgírí, vol. i, pp. 669 & 675.—B. Dig., pp. 304 & 310.

(*d.*) When a *khulá** has been entered into for the property named, known, and equal to the dower, then if the woman has been enjoyed, and she has taken possession of the dower, she must deliver the exchange for the *khulá* to her husband.†

(*d.*) When a *khulá* has been entered into for the dower, then if the woman has been enjoyed and has obtained possession of it, the husband may reclaim it from her; and if she has not obtained possession of it, his liability for the whole dower falls to the ground, and neither party has any claim against the other for anything. If, again, she has not been enjoyed, yet has obtained possession of the dower, supposing it to be a thousand *dirams*, the husband may revert to her for the whole thousand on a favorable construction; and if she has not obtained possession of the dower, her right to the whole falls to the ground on a favorable construction, and he has no further claim against her.†

(*d.*) When a *khulá* has been entered into for a tenth of the dower (still supposing it to be a thousand *dirams*), then if the woman has been enjoyed and has got possession of the dower, the husband may sue her for a hundred *dirams*, but must relinquish the remainder according to all their opinions.†

What has been said applies to cases where a *khulá* has been entered into for the whole, or a part of the dower; but when they have entered into a *mubárát* for the whole, or a part of the dower, then the answer would be the same according to both *Abú Hanífah* and *Abú Yusuf*, as according to the former alone in the case of *khulá*.†

When a man has said to his wife "Thou hast bought from me three repudiations for thy dower and maintenance during *iddat*," and she has answered "I have bought," there is no repudiation till he say "I have sold," unless he intended to confirm the fact, and not to make an offer.†

But,—

CCCCXXXII. If he should say "Buy of me three repudiations for thy dower and the mainte- *Principle.*

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* Here the word in the original is 'mukhálát' which signifies mutual release.

† Fatáwá Alamgíri, vol. i, pp. 669, 670 & 673.—B. Dig., pp. 305—309.

LECTURE XIV.

nance of thy *iddat*," and she should say "I have bought," there would be a complete *khulá* between them. And if *he* were to say "I have sold thyself to thee," and *she* "I have bought," there would be an irrevocable repudiation.*

A man has said to his wife "I have sold to thee thy business for a thousand *dirams*," and she has said at the meeting "I have chosen myself," repudiation takes effect at the thousand.*

Principle. CCCCXXXIII. When a man makes a *khulá* for what is due to his wife of her dower, and it appears that nothing is due to her by him, she must restore the dower to him.*

Principle. CCCCXXXIV. But if he should give or enter in to a *khulá* with her, to give her one talák for the dower that is due to her, well knowing that no dower is due to her by him, and she should accept, one gratuitous repudiation would take effect, which would be irrevocable in the case of *khulá*, and revocable in that of *talák*.*

Principle. CCCCXXXV. If a woman say to her husband "grant me *khulá* for what is in my hand," and he agree, and it should afterwards appear that she had *nothing* in her hand, divorce takes place; but nothing remains incumbent upon the woman, as she has not deceived her husband by any *specific* mention of *property*.—Hidáyah, vol. i, page 318.

Principle. CCCCXXXVI. But if she were to say "grant me *khulá* for *the property* in my hand," and he agree accordingly, and it should appear that she had nothing in her hand, she must in this case return to him her dower.—*Ibid.*

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* Fatáwá Alamgírí, vol. i, pp. 670, 673 & 674.—B. Dig., pp. 307—309.

CCCCXXXVII. When a *khulá* has been entered into, any addition made to the exchange is void.*

Principle.

If a woman should enter into a *khulá* on the terms of keeping a child till puberty, the *khulá* is valid if the child be a female;† but not so if the child be a son. And when it is said that a *khulá* would be lawful on the terms of keeping a child, it is to be understood that the time for which the child is to be kept is specified, for otherwise it would not be valid.*

CCCCXXXVIII. If a woman say to her husband "divorce me thrice for one thousand *dirams*," and he pronounce a single divorce, there remains incumbent upon her one-third of the thousand *dirams*.

Principle.

Because in requiring three divorces for the whole sum, she has required each divorce *separately* for a *third* of that sum. It is, however, to be observed that the single divorce pronounced in this case is irreversible as being given for property.—Hidáyah, vol. i, page 319.

But—

CCCCXXXIX. If a man say to his wife "divorce yourself thrice for (or upon payment of) one thousand *dirams*," and she pronounce upon herself one divorce, no effect whatever takes place.—Hidáyah, vol. i, page 320.

Principle.

Because the husband is not desirous that she should become *separated* for anything short of the whole sum specified: contrary to the case where the proposal comes from the wife (as in the preceding instance).—Hidáyah, vol. i, page 320.

CCCCXL. If a man should say (to his wife) "give thyself a *khulá*," and she say "I have given myself a *khulá* from thee," and the husband should allow it, it would be lawful without any property.*

Principle.

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* Fatáwá Alamgírí, vol. i, pp. 671 & 672.—B. Dig., pp. 307 & 308.

† See *Hazánant* in Lecture XV.

LECTURE XIV.

Principle. CCCCXLI. If a man say to his wife "you are divorced upon payment of one thousand *dirams*," and she agree divorce takes place upon her, and the husband has a claim upon her for the thousand *dirams*.—Hidáyah, vol. i, page 320.

Principle. CCCCXLII. When he has repudiated her before consummation for a thousand, and three thousand are due by him to her for dower, one thousand and five hundred drop by reason of the repudiation being before consummation; and the remainder being a debt against him, one thousand of it is set off against her liability, and she is entitled to revert to him for five hundred.*

Principle. CCCCXLIII. When he has made the dower into three parts, and repudiated her once for a third of the dower, and then a second and a third time in like manner, three repudiations take effect, but only one-third of the dower drops, the husband being liable for the remainder.*

Principle. CCCCXLIV. When a *khulá* is made for something to be fixed by him or her, or by a stranger, it is lawful as in the case of dower, with this difference that there the standard is the proper dower, while here it is the dower he may have given her.*

If, then, it were to be fixed by the husband, and he should specify that amount or less, it would be valid; but if he were to specify more, it would not be so unless assented to by the wife; and in like manner if it were to be fixed by her, and she should specify that amount or more, it would be lawful; but if less, the abatement would not be established unless he were content. In like manner when the amount is to be fixed by a stranger, and he specifies more or less than the amount given by the husband, thereupon abatement is not established, unless assented to by the wife or husband, as the case may be.*

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* Fatáwá Alamgírí, vol. i, pp. 676 & 677.—B. Dig., pp. 311 & 312.

CCCCXLV. The husband and wife can mutually discharge themselves, and the mutual discharge leaves each party without any claim upon the other *(f)*. *Principle.*

(*f.*) A *mubárát* or mutual discharge (signified by a man saying to his wife, "I am discharged from the marriage between you and me," and her consenting to it,) is the same as *khulá*, that is to say, in consequence of the declaration of both, every claim which each had upon the other drops, so far as those claims are connected with their *marriage*.—Hidáyah, vol. i, page 323. Consequently,

When a *khulá* is made by means of the words *khulá*, it does not occasion a release of any other debts than dower, according to *Abú Hanífah* as reported in the Záhir-ur-Rawáyit, which is held to be correct. In like manner with regard to the word *mubárát*, though there is a difference of opinion, the correct view is that it does not occasion a release of other debts than dower. So, also, with regard to the words *sale* and *purchase*; though there is the like difference of opinion, the most correct is that, like *khulá* and *mubárát*, they do not occasion a release of other debts than dower. Neither these words, nor repudiation for property, occasion a release of maintenance during *iddat*, without a condition to that effect, according to all opinions. Nor do they effect a release from the maintenance of a child, or the hire of suckling it, without a special condition. Fatáwá Alamgírí, vol. i, page 669.—B. Dig., pages 304 & 305.

CCCCXLVI. Whether the word *khulá* or *mubárát* (which means mutual release), or sale be employed, as for instance, whether a person should say "I have given thee a *khulá* for a thousand *dirams*," or "repudiated thee for a thousand," or "released thee," or "sold thyself to thee," or "thy repudiation to thee for a thousand," repudiation *Principle.*

ANNOTATIONS.

ccccxlvi. *Khulá* and *mubárát* cause every right to fall or cease which either party has against the other depending on marriage.—Fatáwá Alamgírí, vol. i, page 669.—B. Dig., page 304.

LECTURE XIV.

does not take effect without her acceptance at the meeting, for the transaction is exchange.*

Principle. CCCCXLVII. *Khulá* may be entered into or effected through an authorized agent. One person may represent both the husband and wife.—*Vide* Fatáwá Alamgírí, vol. i, page 685.—B. Dig., page 318.

Principle. CCCCXLVIII. A father may, with the permission of his grown-up daughter, enter into a *khulá* for her or her dower; but if done without her consent or subsequent sanction, and the father has not given security for the dower, the transaction is not lawful, and the *khulá* is without effect.*

But if he has given security repudiation takes effect; except, however, insomuch that it is not operative till the news reach her and she approves; and if she does not approve of it, she may have recourse to the husband for her dower, and he can sue the father on his security.*

Principle. CCCCXLIX. The *khulá* entered into by a father on behalf of his infant daughter is invalid, unless he engage to hold himself responsible for the compensation, or refer it to the consent of his daughter, where she is competent (*a*).

(*a.*) If a father transact a *khulá* with the husband of his infant daughter, agreeing to pay the consideration out of her property, the *khulá* is not valid with respect to her. If a father transact a *khulá* on the part of his infant daughter for a certain sum, engaging to hold himself responsible for the payment, the *khulá* is valid, and the sum specified becomes incumbent upon him.—Hidáyah, vol. i, page 324.

Principle. CCCCL. *Khulá* or divorce is not demandable as a *right* by the wife on payment of consideration.

Precedent. Held that, by the Muhammadan law, divorce is not demandable as a right by the wife on payment of considera-

* *Vide* Fatáwá Alamgiri, vol. i, pp. 669 & 686.—B. Dig., pp. 304, 318, 319.

tion.—Moulavee Abdul Wohab *versus* Mussammat Hingoo and another. The 5th of May 1832.—Select Sudder Dewanny Adawlut Reports, vol. v, page 200. LECTURE XIV.

'*Iddat*' is the waiting for a definite period, which is incumbent on a woman after the dissolution of a rightful or semblable marriage that has been confirmed by consummation or by death (of the husband).* *Iddat* defined.

CCCCLI. When the husband of a woman has died, or divorced her after consummation or valid retirement,† it is incumbent upon her to abstain for a fixed period from uniting in marriage with another man, in order that it might be ascertained whether or not she is pregnant by the deceased or the divorcer. This abstinence is termed *iddat* (*a*). *Principle.*

(*a.*) When a man has married a woman *by a lawful contract,* and has repudiated her *after* consummation, or after a *valid* retirement,† it is incumbent on her to observe an *iddat.*‡

CCCCLII. But if the marriage were invalid, and the judge should make a separation between the parties before consummation, though after a valid retirement,† the *iddat* would not be incumbent; while if the separation should not take place till *after* consummation, she would have to observe an *iddat* reckoning from the time of separation: and so, also, in the case of a separation without a judicial decree.‡ *Principle.*

Iddat is not due for connection under a marriage contracted by a Fazúlí,§ nor for illicit intercourse (ziná) according to Abú Hanífah and Muhammad.‡

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* By *iddat* is understood the term of probation incumbent upon a woman in consequence of the dissolution of marriage after carnal connection: the most approved definition of *iddat* is, *the term by the completion of which a new marriage is rendered lawful.*—Hamilton's Hidáyah, vol. i, page 359.

† See *ante*, pp. 354 & 357.

‡ Fatáwá Alamgírí, vol. i, page 711.—B. Dig., page 350.

§ See *ante*, pp. 339 & 340.

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Any separation without repudiation comes within the same meaning in respect of *iddat*, as, for instance, when it takes place under the options of puberty and emancipation, or for want of equality, or by reason of one of the married parties becoming the property of the other, because it has been made incumbent for the purpose of ascertaining the state of the womb.

Principle.

CCCCLIII. The *iddat* (or abstinence on account) of divorce commences *immediately* upon divorce, and that of widowhood upon the decease of the husband.—Hidáyah, vol. i, page 366.

If, therefore, a woman be not informed of her *widowhood* or divorce, until such time as the term of *iddat* be passed, her *iddat* is then accomplished, because the occasion of *iddat* being incumbent is widowhood or divorce, and it is therefore held to commence upon the *occurrence* of the occasion. Our modern doctors have decreed that the *iddat* of divorce should not be held to commence until the divorce be publicly declared.—Hidáyah, vol. i, page 366.

The above respects a valid marriage; but—

Principle.

CCCCLIV. In an invalid marriage the *iddat* commences immediately upon the Kází's decree of separation, or upon the determination of the husband, expressly signified, to refrain from carnal connection.—Hidáyah, vol. i, page 366.

ANNOTATIONS.

ccccliii, ccccliv. The *iddat* of repudiation commences from the repudiation, and that of death from the death; so that, if the events are not known until the period of the *iddat* has actually passed, it is held to have expired. The *iddat* for an invalid marriage runs from the separation, or the day that the man determined on abandoning the connection. When a man has repudiated his wife, and then denied the fact, whereupon she establishes it against him by proof, and the Judge pronounces a decree of separation, the *iddat* is to be reckoned from the time of the repudiation, not from the decree.—Fatáwá Alamgírí, vol. i, pp. 411 & 413.—B. Dig., pp. 350 & 355.

CCCCLV. Four descriptions of women are exempted from observing the *iddat*, namely, 1—a woman who has been repudiated before consummation; 2—an alien who has come under protection into the country of *Islám*, having left her husband in the hostile country (*dár-ul-harb*); 3—two sisters married under one contract; 4—more than four women married together under one contract, whose marriage has been dissolved. *Principle.*

CCCCLVI. When a man repudiates his wife being a free woman, either by a *reversible* or an *irreversible* divorce, or when separation takes place between a husband and wife without divorce, *after* carnal connection, the *iddat* (or the term of probation) consists of three terms of her courses, provided she be one who is subject to the menstrual discharge.—Hidáyah, vol. i, page 359. *Principle.*

ANNOTATIONS.

ccccIv. Four women are not liable to *iddat*, namely, 1st, a woman who has been repudiated before consummation; 2nd, a *harbíah* or alien, who has come under protection into 'our' dár, having left her husband in the *dár-ul-harb*; 3rd, two sisters married by one contract which has been cancelled; 4th, more than four women connected together in one contract which has been dissolved.—Fatáwá Alamgírí, page 711.—B. Dig., page 351.

ccccIvi. When a man has repudiated his wife absolutely or revocably, or three times, or a separation has taken place between them without repudiation, and she is free and subject to monthly courses, her *iddat* is three terms of the courses, whether the free woman be a *muslimah* or a *kitábíah*.—Fatáwá Alamgírí, vol. i, page 712.—B. Dig., page 351.

The separation which takes place between a married couple, independent of divorce, bears the same construction as divorce, because the *iddat* is made incumbent in a case of divorce for the purpose of ascertaining whether the woman be pregnant, and the same necessity occurs where separation takes place between a husband and an enjoyed wife without divorce. The separation without divorce may be occasioned either by a woman admitting the son of her husband to carnal connexion, or by her apostatizing from the faith.—Hidáyah, vol. i, page 359.

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Principle. CCCCLVII. The *iddat* of one who, from extreme youth or old age, is not subject to the courses, or who, though she has arrived at the age of puberty, has never menstruated, is three months* (not three terms of her courses).†

Principle. CCCCLVIII. When a repudiated woman has kept (observed) one or two courses, and they then cease, the *iddat* is not completed until she despair of their return; she must commence anew by months.‡

Principle. CCCCLIX. The *iddat* of a pregnant woman is accomplished by her delivery, whether she be a *slave* or free.—Hidáyah, vol. i, page 360.

Because God in the sacred writings has ordained respecting woman in that situation.—*Ibid.*

ANNOTATIONS.

ccccIvii. The *iddat* of a woman who, on account of extreme youth, or age, is not subject to the menstrual discharge, is three months, because God has so ordained in the sacred writings.—Hidáyah, vol. i, page 360.

ccccix. The *iddat* of a pregnant woman continues till her delivery, whether she be free or an absolute slave, or a *mudabburah*, *mukátabah*, *umm-iwalad* or *mustasaah*, also whether she be a *muslimah* or *kitábiah*, or the *iddat* were occasioned by repudiation, death, relinquishment, or connection under a semblance of right, and whether the pregnancy be such that the *nasab* or paternal descent of the issue is established or not, as, for instance, where a man has married a woman already pregnant by *zinâ* or fornication.—Fatáwá Alamgírí, vol. i, page 713.—B. Dig., page 353.

* Fatáwá Alamgírí, vol. i, page 712.—B. Dig., pp. 351 & 355.

† A young girl being repudiated by her husband, three months of her *iddat* have passed except one day, when the courses appear; in these circumstances the *iddat* is not completed until they have occurred three times.—B. Dig., page 355.

‡ So also of one who has seen the discharge for a day, after which it has disappeared, the *iddat* is by months; but if the discharge has appeared for three days and then ceased, the *iddat* is by courses; while if it continue for anything less than three days, the *iddat* is by months. When a young girl, who is under *iddat* by months, menstruates, the reckoning is void, and she must commence anew by courses.—Fatáwá Alamgírí, page 712.—B. Dig., page 351.

CCCCLX. The *iddat* of a female slave is two terms of her courses. Where the female slave is one who, from extreme youth or age, is not subject to the menstrual discharge, her *iddat* is one month and a half on account of her bondage.—Hidáyah, vol. ii, page 360. *Principle.*

CCCCLXI. If an *áyisah** be in her *iddat*, counting it by months, and the menstrual discharge should chance to appear upon her, in this case all regard to that portion of the *iddat* which has been counted by months drops, and her *iddat* commences *de novo*, to be counted by the terms of her courses.—Hidáyah, vol. i, page 362. *Principle.*

CCCCLXII. The *iddat* of a woman wedded by an invalid marriage is counted by her courses; both in case of her husband's death, and also of a separation taking place between them; and so likewise that of a woman with whom a man has had carnal connection erroneously.—Hidáyah, vol. i, page 363. *Principle.*

Because in those cases the *iddat* is incumbent merely for the purpose of ascertaining whether the woman be pregnant and not as a *right of marriage;* and as the

ANNOTATIONS.

ccccl x. The *iddat* of an absolute slave, or a *mudabbarah*, *umm-i-walad*, or *mukátibah*, is two terms of the courses after repudiation or cancellation; or if she be not subject to the courses, it is a month and a half.—Fatáwá Alamgírí, vol. i, page 714.—B. Dig., page 352.

ccccl xi. If a free woman be an *áyisah*, that is, one who has despaired of having issue, her *iddat* is three months. But if, after beginning to reckon by months, she should perceive the discharge, she must begin anew and reckon by *courses*, that is, when it has come in the usual way, for its return negatives her despair. When an *áyisah* has kept part of her *iddat* by months, and then is pregnant, the *iddat* is to be completed by delivery.—Fatáwá Alamgírí, page 714.—B. Dig., page 353.

* Literally a *despairer*, that is, a woman whose courses are stopped, and who is consequently supposed to be past child-bearing.

LECTURE XIV.

courses are the means of ascertaining the state of the womb, the *iddat* of those women is to be counted by their returns.—Hidáyah, vol. i, page 363.

Principle.

CCCCLXIII. When a man has consummated with a woman under a semblance of right, or a marriage that is invalid, he is liable for the dower, and she to an *iddat* for three courses if she be free, and two if she be a slave, and that whether her husband have died leaving her surviving, or has separated from her while living, while, if from extreme youth or old age, she is not subject to the courses, her *iddat*, when free, is three months, and one month and a half when a slave.—Fatáwá Alamgírí, vol. i, page 712. —B. Dig., page 352.

Principle.

CCCCLXIV. Upon the death of a husband, whether free or a slave, the term of *iddat* for his widow if a free woman (of any description) is four months and ten days and night, and that for a slave (of any description) is half of that period. This *iddat*, however, is incumbent only in the case of valid marriage, no matter whether the same has been consummated or not.

Principle.

CCCCLXV. If a man upon his death-bed repudiate his wife by a *reversible* divorce, then the term

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ANNOTATIONS.

ecccLxiv. The *iddat* of a free woman upon the decease of her husband is four months and ten days, such being the term mentioned in the *Kurán*; and that of a female slave, in the like circumstance, is two months and five days, bondage being restrictive of the half.—Hidáyah, vol. i, page 360.

The *iddat* for a free woman for the death of her husband is four months and ten days, whether the marriage were consummated or not, or the woman be a *muslimah* or *kitábíah*, or an infant, or an adult, or *áyisah*, or her husband were free or a slave, and whether she had menstruated within the period or not, provided she does not appear to be pregnant. This *iddat* is not incumbent except for a valid marriage. And by ten days are meant ten nights and ten days according to geneard agreement.—Fatáwá Alamgírí, vol. i, page 714.—B. Dig., page 353.

of her *iddat* is four months and ten days according to all the doctors; if by an *irreversible* divorce, then according to *Abú Hanífah* and *Muhammad*, the term is four months and ten days if she complete three terms of her courses within that period, otherwise the time which may be required to complete three menstruations.

A man having repudiated his wife revocably, she has kept the *iddat* for three terms, except one day, when the husband dies: four months and ten days are now incumbent on her.—Fatáwá Alamgírí vol. i, page 717.—B. Dig., page 355.

CCCCLXVI. When a man having repudiated his wife by an irreversible divorce marries her again during her *iddat*,* and afterwards divorces her before consummation, a complete dower is in this case incumbent upon him, and upon the woman an *iddat de novo*.—Hidáyah, vol. i, page 367. *Principle.*

CCCCLXVII. If a man divorce his wife whilst in her courses, the term of her *iddat* is to be counted not from that menstruation but from the next. *Principle.*

CCCCLXVIII. If a man have erroneously carnal connection with a woman who is in her *iddat* from divorce, another *iddat* becomes incumbent upon her, *Principle.*

ANNOTATIONS.

When a married woman is a slave, and her husband has died leaving her surviving him, her *iddat* is two months and five days. And the same rule applies to a *mudabbarah*, *mukátibah*, *umm-i-walad*,† and *mustasaah*‡ according to Abú Hanífah.—Fatáwá Alamgírí, vol. i, page 712.—B. Dig., page 353.

ccccLxvii. If a man divorce his wife whilst in her courses, that term is not to be counted in her *iddat*, because the *iddat* is fixed at *three complete* menstruations; and if the above were to be counted, it would induce a deficiency, as part of that had passed previous to divorce, and therefore cannot be included.—Hidáyah, vol. i, page 365.

* See pp. 443 & 444.

† See *ante*, page 275.

‡ A slave working out her emancipation.

LECTURE XIV.

and the two are blended together, that is to say, her ensuing courses are counted from both *iddats;* and if the former *iddat* should be accomplished before the latter, the accomplishment of that still remains incumbent upon her.—Hidáyah, vol. i, page 363.

Principle.

CCCCLXIX. If a man have carnal connection with a woman who is in her *iddat* from the death of her husband, she is to complete that of four months and ten days, being the *iddat* of widowhood; at the same time counting such terms of her courses as may occur within the remainder of that time, so that the two *iddats* may be counted together as far as possible.—Hidáyah, vol. i, page 366.

Principle. Of Rajat.

CCCCLXX. After divorcing his wife by one or two revocable repudiations, a man may retain her or take her back any time *before* the expiration of the term of *iddat* (*a*) or abstinence, even though she be unwilling. This retention is termed *rajat.**

(*a.*) The existence of the *iddat* is a condition of rajat (retention), because by rajat is understood a continuance of the marriage (whence the term retention is applied to it), and this cannot be established but during the *iddat,* since after that is passed the marriage no longer remains.—Hidáyah, vol. i, page 289.

ANNOTATIONS.

cccclxx. If a man give his wife one or two divorces reversible, he may take her back any time *before* the expiration of her *iddat,* whether she be desirous or not.—Hidáyah, vol. i, page 289.

When a man has repudiated his wife by one revocable repudiation, or two repudiations, he may retain her while she is still in her *iddat,* whether she be willing or not.—Fatáwá Alamgirí, vol. i, page 645.—B. Dig., page 285.

* 'Rajat' signifies the maintaining of a marriage in its former condition while the wife is still in her *iddat:* or, in other words, a husband returning to, or receiving back, his wife after divorce, and restoring her to her former situation.—*Vide* Hidáyah, vol. i, page 219.—B. Dig., page 285.

CCCCLXXI. Retention (*raját*) may be effected by words (*b*) as well as by act (*c*). LECTURE XIV.

(*b.*) The words of 'raját' or retention are either saríh or kináyat, that is, as before explained, express or ambiguous. The express words are—"I have brought thee back," or "I have retained thee," or "I have restored thee." The ambiguous words are—"Thou art to me as thou wast," or "Thou art my wife," and these are not sufficient without retention.*

(*c.*) As by matrimonial intercourse or touch with desire, so also by kissing on the mouth with desire, by general agreement.* *Example.*

(*b, c.*) Raját is of two species: the first termed 'express,' where the husband says, for example, "I have returned to (or taken back) my wife," or addresses the same to her personally; and the second, implied, where he has carnal connexion, or takes conjugal liberties with her, such as viewing those parts of her which are usually concealed, and so forth.—Hidáyah, vol. i, page 290.

CCCCLXXII. Retention by an insane person must be by act and not by speech.* *Principle.*

CCCCLXXIII. Retention like marriage is valid, though made under compulsion, or in jest, or in sport, or by mistake; and if a husband should allow a retention as pronounced by a fazúlí or unauthorized person, it would also be valid, but retention cannot be suspended on a condition (*d*).* *Principle.*

(*d.*) As if a husband should say "When the morrow comes," or "when thou hast entered the house," or "done so and so, I have retained thee" this would be no *raját* according to them all. Nor if he were to stipulate for an

ANNOTATIONS.

cccclxxi. As *raját* or retention is established by speech, it may be so in likewise by deed.*

* Fatáwá Alamgirí, vol. i, pp. 646 & 647.—B. Dig., pp. 285—288.

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option would retention be valid; and if he should say after repudiation "I have retained thee tomorrow," or "the beginning of the month," it would not be valid by all opinions.*

Principle. CCCCLXXIV. The repudiated wife, if a free woman, cannot be *retained* after the expiration of her *third* courses, since after that remarriage is the only means to take her back.

Principle. CCCCLXXV. It is laudable that the husband have two witnesses to bear evidence to his *raját* (retention), yet if he have no witnesses the *raját* is nevertheless legal.—Hidáyah, vol. i, page 291.

Principle. CCCCLXXVI. If a divorced wife who is pregnant, or who has brought forth a child, declare that he has never had carnal connection with her, he (the husband) is nevertheless at liberty to take her back (provided it be possible to derive the pregnancy from him).—*Ibid*, page 296.

Because where the pregnancy appears within such time as renders it possible to be derived from him, to him it is to be ascribed; and this circumstance proves his connection with her, whence a right of *raját* is established in him, as the divorce thus appears to be reversible.—Hidáyah, vol. i, page 297.

Principle. CCCCLXXVII. In the case of three divorces not taking place, but one irrevocable or irreversible

ANNOTATIONS.

ccccLxxiv. The right to retain a repudiated wife is at an end as soon as she has come out of her *third* courses if she be free, or the *second* if she be a slave.*

ccccLxxvii. If a man has repudiated his wife irrevocably without giving her three repudiations, he may marry her again during her *iddat* or after its expiration.—Fatáwá Alamgírí, vol. i, page 651.—B. Dig., page 290.

* Fatáwá Alamgírí, vol. i, pp. 646 & 647.—B. Dig., pp. 285—288.

divorce being effected on the first or second repudiation, the husband cannot simply retain his wife (as on the occurrence of a revocable divorce or divorces), but to take her back he must marry her again either during the *iddat*, or after the expiration thereof.

As the legality of the subject still continues since the utter extinction of such legality depends upon a third divorce; and accordingly, until a third divorce take place, the legality of the subject continues.—Hidáyah, vol. i, page 301. So—

In a case of irreversible divorce short of three divorces, the husband is at liberty to marry his wife again, either during her *iddat* or after its expiration.—Hidáyah, vol. i, page 301. But—

CCCCLXXVIII. In the case of three divorces being given upon a woman who is free, the husband cannot take her back by remarrying *immediately after* the third divorce which is always an aggravated one (mughallazah), but to take her back he must remarry her *after* she was married to another man, who after enjoying her has either divorced her, or died leaving her his widow, and her *iddat* from him is accomplished (*e*). *Principle.*

(*e.*) If a man pronounce three divorces upon a wife who is free, or two upon one who is a slave, she is not lawful to him until she shall first have been regularly espoused by another man, who, having duly consummated, afterwards divorces her or dies, and her *iddat* from him be accomplished, because God has said "if he divorce her,"

ANNOTATIONS.

ecccLxxviii. But when he has repudiated her three times, being a free woman, or twice being a slave, it is not lawful for him to marry her again till she has been married by a valid and operative contract to another husband, who, after enjoying her, has repudiated, or died leaving her his widow. And in this there is no difference whether the repudiated woman were an enjoyed wife or not so.—Fatáwá Alamgírí, vol. i, page 651.—B. Dig., page 290.

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she is not after that lawful to him (that is after a third divorce), until she marry another husband." And here two divorces to a slave are the same as three to a free woman, because the legality of the subject has only half its force in a slave on account of her state of bondage; and hence it would follow that to such an one a divorce and a half stands the same as three divorces to a free woman, but as divorce is incapable of subdivision, two divorces are allowed.—Hidáyah, vol. i, pages 301 & 302.

Principle.

CCCCLXXIX. If a woman divorced by three repudiations be married to a man on condition of his divorcing her after consummation, and thus rendering her lawful to her former husband, still it will not be unlawful for the first husband to marry her again after completion of the *iddat* from the second husband, though the marriage contracted as above by the second husband be held abominable in law (*f*).

(*f*.) If a man marry a woman whose husband had repudiated her by three divorces, under a condition of rendering her lawful to her former husband as if he were to declare to her—"I marry you under a condition of rendering you lawful to your former husband," or as if she were to say to him—"I marry with you under the condition of my becoming lawful to my former husband," this is an abominable marriage, because the second husband is here termed a *Muhallil*, or legalizer, and the Prophet has said—"let the curse of God fall upon the *Muhallil*, and the Mohallal-la-hu*: but nevertheless if the parties contract a marriage under this condition, and the man divorce the woman after carnal connexion, she upon the completion of her *iddat* becomes lawful to her former husband, as there undoubtedly exists a consummation in a regular marriage which is the cause of legality, and the marriage is not invalidated by the condition.—Hidáyah, vol. i, pages 303 & 304.

* Literally "for whom legalized," that is, the man for whom, or to whom, the woman is legalized.

CCCCLXXX. When a woman is afraid that the legalizer will not repudiate her, she may say (to him)—"I marry myself to thee on condition that my business is to be in my own hand, to repudiate myself whenever I please," and he accepts, such a marriage is lawful; the business being in her hands.* *Principle.*

CCCCLXXXI. If a man pronounce three divorces upon his wife and she afterwards declare that her '*iddat* having been duly accomplished, she has been married to another man, and enjoyed and divorced by him, and that her *iddat* from him is elapsed,' her former husband may lawfully admit her asseveration and marry her, provided that from the period of his divorcing her such a space of time have elapsed as affords a possibility of this having been the case, and that he actually believe her assertion to be true.—Hidáyah, vol. i, page 305. *Principle.*

CCCCLXXXII. The first husband who recovers his divorced wife by means of an intervening marriage between her and another man recovers his power of pronouncing upon her repudiations as far as three (*g*). *Principle.*

(*g*.) If a man repudiate his wife by one or by two divorces, and her *iddat* being completed, she be married to another man, and afterwards return to her former husband, he becomes again authorized so far as three divorces, the one or the two divorces formerly pronounced upon her by

ANNOTATIONS.

ccccLxxxii. When a man has repudiated his wife three times, and she has said "my *iddat* having passed, I married again, was enjoyed by my husband, and he has repudiated me, and my *iddat* has passed," her first husband may lawfully believe her if time admit of all this, and he thinks it highly probable that she is speaking the truth.*

* Fatáwá Alamgírí, vol. i., pp. 653 & 654.—B. Dig., pp. 291—293.

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him having been cancelled and obliterated by her marriage with the second husband in the same manner as three divorces would have been. This is the doctrine of the two Elders. Muhammad (however) says that marriage with a second husband does not obliterate anything short of three divorces.—Hidáyah, vol. i, pages 304 & 305.

Principle. CCCCLXXXIII. When a man has married a woman by an invalid contract, and has repudiated her three times, he may lawfully remarry her, though she should not have intermediately married with another.*

Principle. CCCCLXXXIV. When two witnesses have attested to a woman that her husband has repudiated her three times at a time that he was absent from her, she may marry another, but not if he were present.*

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* Fatáwá Alamgírí, vol. i, pp. 653 & 654.—B. Dig., page 291.

LECTURE XV.

ON MAINTENANCE.

MAINTENANCE (*nafkah**) comprehends food, raiment, and lodging, though in common parlance it is limited to the first.—Durr-ul-Mukhtár, page 283. Maintenance defined.

There are three causes for (each of) which it is incumbent on one person to maintain another—marriage, relationship, and property (that is being a slave).—*Ibid.*

CCCCLXXXV. A husband is bound to give proper maintenance (*a*) to his wife or wives (*b*), provided she or they have not become refractory or rebellious (*c*), but have surrendered herself or themselves to the custody of their husband. *Principle.*

ANNOTATIONS.

cccclxxxv. When a woman surrenders herself into the custody of her husband, it is incumbent upon him thenceforth to supply her with food, clothing, and lodging, whether she be a *Mussalmán* or an *infidel*, because such is the precept both in the *Kurán* and in the traditions; and also because maintenance is a recompence for the matrimonial restraint.—Hidáyah, vol. i, page 392.

It is incumbent on a husband to maintain his wife, whether she be Muslim or *zimmí*, poor or rich, enjoyed or unenjoyed, young or old, if not too young for matrimonial intercourse; and it makes no difference whether she be free or a *mukátibah*.—Fatáwá Alamgírí, vol. i, page 732.—B. Dig., page 437.

* '*Nafkah*' in the language of the law signifies all those things which are necessary to the support of life, such as food, clothes, and lodging: many confine it solely to food.—Hamilton's Hidáyah, vol. i, page 392.

LECTURE XV.

(*a.*) Proper maintenance comprehends food, raiment, and lodging.*—B. Dig., page 442.

(*b.*) When a man has several wives, some of whom are free Muslims and some are slaves, they are all alike in respect of maintenance. But a woman enjoyed under a semblance of legality has no right to any maintenance. And it is said that there is no maintenance in cases of invalid marriage or their consequent *iddats.*—Fatáwá Alamgírí, vol. i, page 735.—B. Dig., page 440.

(*c.*) If a wife be disobedient or refractory, and go abroad without her husband's consent, she is not entitled to any support from him, until she return and make submission, because the rejection of the matrimonial restraint in this instance originates with her: but when she returns home she is then subject to it, for which reason she again becomes entitled to her support as before. It is otherwise where a woman, residing in the house of her husband, refuses to admit him to the conjugal embrace, as she is entitled to maintenance, notwithstanding her opposition, because, being then in his power, he may, if he please, enjoy her by force.—Hidáyah, vol. i, page 394.

If a woman be a *náshizah* or rebellious, she has no right to maintenance until she return to her husband's house. By this expression is to be understood a woman who goes out from her husband's house (*munzil*), and denies herself to him, in contradistinction to one who merely refuses to abide in her husband's apartment (*bait*), which is not necessary for the purpose of restraint.—Fatáwá Alamgírí, vol. i, page 733.—B. Dig., page 438.

When she ceases to be a *náshizah* or rebellious, she is again entitled to maintenance.—*Ibid.*

However,—

Principle. CCCCLXXXVI. If a woman refused to surrender herself on account of her dower, her maintenance does not drop, but it is incumbent upon the husband, although she be not yet within his custody.

* It is incumbent upon a husband to provide a separate apartment for his wife's habitation, to be solely and exclusively appropriated to her use; because this is essentially necessary to her, and is therefore her due, the same as maintenance, and the word of God appoints her a dwelling-house as well as a subsistence.—Hidáyah, vol. i, page 401.

Since her refusal is only in pursuance of her right, and consequently the objection to the matrimonial custody originates with the husband.—Hidáyah, vol. i, page 394.

CCCCLXXXVII. An adult woman who has not removed to her husband's house is not disentitled to have maintenance from him unless he has called upon her to remove, and she has refused to do so without a right; but if she has refused to do so of right, that is, to obtain payment of her dower, she is entitled to maintenance. *Principle.*

CCCCLXXXVIII. If a man's wife be so young as to be incapable of generation (that is matrimonial intercourse), her maintenance is not incumbent upon him.—Hidáyah, vol i, page 394. *Principle.*

Because although she should be within his custody, yet as an obstacle exists in her to the carnal embrace, this is not the custody which entitles to maintenance, that being described "*custody for the purpose of enjoyment*," which does not apply to the case of one incapable of the act; contrary to the case of a *sick* woman, to whom maintenance is due, although she be incapable, as shall be hereafter demonstrated.—Hidáyah, vol. i, pages 394 & 395.

CCCCLXXXIX. But if the husband be an infant incapable of generation, and the wife an adult, she *Principle.*

ANNOTATIONS.

ccccLxxxvii. When an adult woman, who has not yet removed to her husband's house, asks for maintenance, she is entitled to it unless he has called upon her to remove; and the fatwá is in accordance with this view, though the lawyers of Balkh have said that she is not entitled till actual removal. If, when called upon to remove to his house, she refuses to do so of right, that is, to obtain payment of her dower, she is entitled to maintenance; but if she refuses to do so without right, as when her dower is paid, or deferred, or has been given to her husband, she has no claim to maintenance.—Fatáwá Alamgírí, vol. i, page 732.—B. Dig., page 437.

ccccLxxxviii. When a wife is too young for matrimonial intercourse, she has no right to maintenance from her husband, whether she be living in her house, or with her father.—*Ibid.*

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is entitled to maintenance at his expense.—Hidáyah, vol. i, page 395.

Because in this case delivery of the person has been performed on her part, and the obstacle to the matrimonial enjoyment exists on the part of the husband.—Hidáyah, vol. i, page 395.

Principle. CCCCXC. An obedient wife's being inflicted with a disease, or overtaken by any other calamity which rendered her unfit for matrimonial intercourse, or having any natural mal-formation obstructive of intercourse, does not invalidate the right to maintenance (*d*).

(*d.*) When a wife, before her removal to her husband's house, falls sick of an illness which is obstructive of intercourse, and is removed, notwithstanding, sick as she is, she is entitled to maintenance after her removal. She is also entitled to it before removal if she had sought to be removed, and her husband had failed to remove her, she being still willing. But if he had asked her to remove, and she had refused, she has no right to maintenance until her removal. If attacked by illness subsequent to her removal, though of such a nature as to prevent matrimonial intercourse, she is entitled to maintenance according to all opinions.*

When a woman is impervious by reason of mal-formation, or becomes mad, or is overtaken by any other calamity that unfits her for matrimonial intercourse, or gets too old for it, she is still entitled to maintenance whether any of these calamities have happened after her removal to her husband's house, or before it, provided she had not previously denied herself without just cause.*

Principle. CCCCXCI. In adjusting the obligation of the *nafkah* or maintenance of a wife, regard is to be had to the rank and condition of both her and of her husband (*e*).—Hidáyah, vol. i, page 393.

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* Fatáwá Alamgírí, vol. i, page 754.—B. Dig., page 440.

(*e.*) Thus, if the parties be both wealthy, he must support her in an opulent manner; if they be both poor, he is required only to provide for her accordingly; and if he be rich and she poor, he is to afford her a moderate subsistence, such as is below the former and above the latter.—Hidáyah, vol. i, page 393.

CCCCXCII. The maintenance of the wife's servants* is incumbent upon her husband, as well as that of the wife herself, provided he be in opulent circumstances.—Hidáyah, vol. i, page 396. *Principle.*

Because he is obliged to provide his wife's maintenance *so far as may suffice*, and it is not sufficient unless her servants also be supported, they being essential to her ease and comfort: but it is not absolutely incumbent upon him to provide a maintenance for more than *one* servant according to *Hanífah* and *Muhammad*.—Hidáyah, vol. i, page 396.

CCCCXCIII. The husband may compound with his wife for her maintenance, and if the amount so settled be insufficient, the latter can sue the former for an increase if the husband be rich. On the other hand, if the settlement be concluded by the wife with the husband it will hold, provided the same be suitable to one of like condition; but in the case of its being in excess thereof, she must be content with the maintenance of her equals.* *Principle.*

When a man compounds with his wife for maintenance at three *dirams* a month it is lawful.*

Thus, in the case already put of a composition for three *dirams* every month, if the wife should afterwards say, "This amount is not sufficient for me," she is at liberty to litigate the matter for an increase if the husband be rich; and if the husband should say "I am unable to pay as much," though the Judge is not to believe him on his mere word, yet if he find on inquiry that it is confirmed by the information of others, he may reduce the amount to what he is able to bear.*

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* Fatáwá Alamgírí, vol. i, page 742.—B. Dig., pp. 446 & 447.

LECTURE XV.

When a woman makes a composition for her maintenance and dress, and it is not much in excess of what is suitable to one of the like condition, the composition will hold good; but if the excess is beyond all reasonable bounds, it must be returned, and the woman be content with the dress and maintenance of her equals.*

Principle. CCCCXCIV. Maintenance may be decreed out of the property of an absent husband, whether it be held in trust, or deposit, or *muzárabat*† for him.*

Principle. CCCCXCV. In all cases in which a Judge may decree maintenance to a wife out of the property of her husband, she may lawfully take it herself out of the property without his order to such an extent as may be justified by common usage. But where the property left by a husband in his own house, or in deposit, is of a different nature from that which a woman is entitled to for maintenance, it can neither be sold by herself nor by the Judge on account of her maintenance (*f*). And upon this point all are agreed.*

(*f*.) If a woman's husband absent himself, leaving effects in the hands of any person, and that person acknowledge the deposit, and admit the woman to be the wife of the absentee, the *Kází* must decree a maintenance to her out of the said effects; and the same to the infant children of the absentee, and also to his parents. And the rule is the same if the *Kází* himself be acquainted with the above two circumstances, where the trustee denies both or either of them.—Hidáyah, pages 402 & 403.

Principle. CCCCXCVI. Arrears of maintenance are not due unless the maintenance have been decreed by the *Kází*, or the rate thereof previously determined and agreed to between the parties. Arrears of decreed maintenance drop in case of the death of either

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* Fatáwá Alamgírí, vol. i, page 737.—B. Dig., pp. 443 & 447.

† Investment in partnership trade.

party. And advances of maintenance cannot be claimed (*g*). LECTURE XV.

(*g*.) If a length of time should have elapsed during which the wife has not received any maintenance from her husband, she is not entitled to demand any for that time, except when the Kází had before determined and decreed it to her, or where she had entered into a composition with the husband respecting it, in either of which cases she is to be decreed her maintenance for the time past.—Hidáyah, vol. i, page 398.

If the Kází decree a wife her maintenance, and a length of time elapse without her receiving any, and the husband should die, her maintenance drops; and the rule is the same if she should die.—Hidáyah, vol. i, page 399.

If a man give his wife one year's maintenance in advance, and then die before the expiration of the year, no claim lies against the woman for restitution of any part of it.—Hidáyah, vol. i, page 399.

CCCCXCVII. If the husband become poor to such a degree as to be unable to provide his wife her maintenance, still they are not to be separated on this account, but the *Kází* shall direct the woman to procure necessaries for herself upon her husband's credit, the amount remaining a debt upon him.—Hidáyah, vol. i, page 397. *Principle.*

CCCCXCVIII. No one shares with a husband the obligation of maintaining his wife as already observed (*h*). *Principle.*

(*h*.) If a woman should have a poor husband, and a son by another husband, or a father, or a brother, in easy

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ANNOTATIONS.

ccccxcvii. When a woman sues her husband for maintenance for a time antecedent to any order of the Judge, or mutual agreement of the parties, the Judge is not to decree maintenance for the past.—Fatáwá Alamgírí, vol. i, page 739.—B. Dig., page 443.

LECTURE XV.

circumstances, the husband, and not the son, father, or brother, is liable for her maintenance. These, however, when in easy circumstances may be ordered to maintain her, and to have recourse against her husband for the amount expended.—Fatáwá Alamgírí, page 756.—B. Dig., page 463.

Principle. CCCCXCIX. A divorced wife is entitled to food, clothing, and lodging during the period of her *iddat*, and until her delivery if she be pregnant (*i*).

(*i.*) Where a man divorces his wife, her subsistence and lodging are incumbent upon him during the term of her *iddat*, whether the divorce be of the reversible or irreversible kind.—Hidáyah, vol. i, page 406.

Principle. D. No maintenance is, however, due to a woman, whether pregnant or not, for the *iddat* observed upon the death of her husband (*j*).

ANNOTATIONS.

d. A *Mutuddah** on account of repudiation is entitled to maintenance and lodging, whether the repudiation be revocable or irrevocable, or triple, and whether she be pregnant or not.—Fatáwá Alamgírí, vol. i, page 747.—B. Dig., page 450.

As a *Mutuddah** is entitled to maintenance during her *iddat*, so also is she entitled to clothing. Her maintenance must be sufficient according to a medium of sufficiency. It is not a fixed sum, but is like the maintenance of marriage, and is to be determined in each case by the like considerations.—Fatáwá Alamgírí, vol. i, page 747.—B. Dig., page 452.

d. A widow has no right to maintenance, whether she be pregnant or not, because the restraint to which she is liable is for the sake of the law, and not of her husband, the *iddat* of widowhood being a religious observance, for which reason it is that it is reckoned by months, and not by courses, as it would be if the object were merely to ascertain whether she is pregnant or not. An *Umm-i-walad*, when pregnant, is entitled to maintenance as against the whole of the estate of her deceased master.—Fatáwá Alamgírí, vol. i, page 747.—B. Dig., page 452.

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* A woman who is in the state of observing abstinence on account of dissolution of marriage.

(*j*.) Maintenance is not due to a woman after her husband's decease, because her subsequent confinement [during the term of *iddat* in consequence of that event] is not on account of the right of her husband but of the *law*, the *iddat* of widowhood being merely a religious observance, whence it is that the design of ascertaining the state of her womb is not in this instance regarded, and accordingly the *iddat* is not counted by the menstrual terms, but by *time*; maintenance is moreover due to a woman from day to day, and the husband's right in his property ceasing upon his decease, it is impossible that any maintenance should be made due from what is after that event the property of his heirs.—Hidáyah, vol. i, page 407.

DI. No maintenance is also due to a woman upon separation caused by her own fault (*k*).

(*k*.) The principle of this is, that when separation is induced by any cause proceeding from the husband, or by any cause proceeding from the wife in exercise of a right, or by any cause proceeding from a third party, the wife is entitled to maintenance during her *iddat*. But if the separation is induced by any fault of the wife, she is not entitled to it.—Fatáwá Alamgírí, vol. i, pp. 746 & 747. B. Dig., page 450.

Hence a *muláunah*, or imprecated woman, is entitled to maintenance and lodging. So also a woman separated by *khulá* or *ílâ*, or by reason of the apostasy of her husband, or of his having connection with her mother. So also the

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ANNOTATIONS.

di. When the separation originates with the woman from anything which can be imputed to her as a *crime*, such as apostatizing from the faith, or having carnal connexion or dalliance with the son of her husband, she has no claim to maintenance during *iddat*, since she has deprived her husband of her person unrighteously, in the same manner as if she were to go out of his house without permission. But it is otherwise where the separation originates with the woman from a circumstance which cannot be imputed to her as a crime, as in a case of option of puberty or manumission, or of a separation demanded by her on account of inequality, in all which cases she remains entitled to maintenance during *iddat*, as she has here legally withdrawn herself from her husband, in the same manner as where she keeps herself from him on account of non-payment of her dower.—Hidáyah, vol. i, page 407.

LECTURE XV.

wife of an impotent man when she elects to be separated from her husband, and a young girl who avails herself of the option of puberty on arriving at the proper age, and a woman who after consummation has been separated from her husband for inequality.*

But if a woman should apostatize, or submit to the embraces of her husband's son or father, or should touch them with desire, she would have no title to maintenance. Otherwise, however, if the connection were against her will. And she does not lose her right to lodging whatever be the cause of separation, because residence with her husband is in consequence of a right which he has over her, while maintenance is in consequence of a right which she has against him.*

DII. If a wife after apostatizing return to the faith, still she has no right to maintenance on account of *iddat*, nor on the ground of separation.

If a woman under triplicate divorce apostatize from the faith her maintenance drops.—Hidáyah, vol. i, page 407.

DIII. When *iddat* has become incumbent on a woman, and she is imprisoned on account of any right against her, the right to maintenance drops. And when a *Mutuddah*† does not confine herself to the house of her *iddat*, but abides there at times, and comes out at times she has no right to maintenance. When a woman who is *náshizah*, or rebellious, is repudiated, she may return to her husband's house and take her maintenance.*

ANNOTATIONS.

dii, diii. When a wife who has apostatized returns to the faith while her *iddat* is still subsisting, she has no right to maintenance; contrary to the case of a *náshizah*, or rebellious wife, who has been repudiated and returns to her allegiance during the *iddat*; for she regains her title to maintenance.*

* Fatáwá Alamgírí, vol. i, page 747.—B. Dig., vol. i, pp. 450—452.

† A woman who is in the state of observing abstinence on account of dissolution of marriage.

Principle Of children.

DIV. A father is bound to support his infant children; and no one shares the obligation with him.*

Principle.

DV. A mother, who is a married wife, cannot be compelled to suckle her infant, except where a nurse cannot be procured, or the child refuses to take the milk of any other than of the mother, who in that case is bound to suckle it, unless incapacitated for want of health or other sufficient cause (*l*).*

(*l.*) If the child be an infant at the breast, there is no obligation upon the mother to suckle it, because the infant's maintenance rests upon the father, and in the same manner the hire of a nurse; it is possible, moreover, that the mother may not be able to suckle it from want of health or other sufficient excuse, in which case any constraint upon her for that purpose would be an act of injustice. What is here advanced proceeds upon a supposition of a nurse being easily procured; but where this is not the case, the mother may be constrained to take that office upon herself lest the infant perish.—Hidáyah, vol. i, pages 408 & 409.

When the child is a suckling, and its mother is married to the father, she cannot be compelled to suckle it if the child will take the milk of another woman. But if the child refuses the milk of any other than the mother, she may be compelled to suckle it, though there is some difference of opinion on the subject. And if neither the father nor the child has any property, the mother may be compelled to suckle it according to general agreement.*

ANNOTATIONS.

DIV. The maintenance of infant children rests upon their father, and no person can be his associate or partner in furnishing it, (in the same manner as no person is admitted to be associated with a husband in providing for the maintenance of his wife).—Hidáyah, vol. i, page, 408.

* *Vide* Fatáwá A'lamgíri, vol. i, page 750.—B. Dig., page 455.

LECTURE XV.

Principle.

DVI. The father must provide a nurse. He cannot, however, hire the child's mother in that capacity except after the expiration of her *iddat.* But there is no objection to his hiring any other of his wives for that purpose. And when the child itself has property, the expense of its suckling may be defrayed therefrom (*m*).

(*m.*) It is the part of a father to hire a woman to suckle his infant child, as this is a duty incumbent upon him; and it is necessary that the nurse so hired stay with or near the mother, if the latter desire it, as the child must be with its mother, she having the right of *Hizánat.* But it is not lawful for the father to hire the *mother* of the child as its nurse if she be his *wife,* or divorced from him, and in her *iddat,* because, although suckling her child be not incumbent upon a mother in point of *law,* yet it is so in point of *religion,* the word of God in the *Kurán* saying "it behoves mothers to suckle their children;" and a mother is excused from this duty only on the supposition of incapacity, but if she agree to perform it for a *compensation,* this is an acknowledgment of her capacity, making the duty incumbent upon her without any consideration whatever.—Hidáyah, vol. i, page 409.

It is not lawful to hire the child's own mother to suckle it while she is the wife of the father, or in *iddat* to him for a revocable repudiation. If the *iddat* be for an irrevocable or triple repudiation she is entitled to hire for suckling her child. After the expiration of her *iddat,* there is no objection to the hiring of the child's mother to suckle it, and if the father should bring another woman for that purpose, the mother being willing to suckle it at the same hire as the strange woman, or without any hire at all, she is entitled to the preference. A man may lawfully hire his

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ANNOTATIONS.

DVI. The father is obliged to provide a nurse for his infant child at his own expense when the child has no property of its own. When it has property, the expense of suckling may be taken out of the property.—Fatáwá Alamgírí, vol. i, p. 750.—B. Dig., page 455.

wife or *Mutuddah* to suckle his child by another woman.*

But a father may lawfully hire, to suckle his child, one of his wives, who is not the child's mother, as suckling it is not a duty incumbent upon her.—Hidáyah, vol. i, page 409.

DVII. If neither the father, nor the child has any property, the mother may be compelled to suckle it, according to general agreement.*

DVIII. The maintenance of an infant child is incumbent upon the father, although he be of a different religion: and in the same manner, the maintenance of a wife is incumbent upon her husband notwithstanding this circumstance (*n*).*

(*n.*) *First*, because the word *offspring*, in the sacred text (as before quoted), is of general application, and also because the child is a partaker of the father's flesh and blood, and consequently is a part of him;—*second*, because the occasion of the obligation of maintenance (namely, a *valid marriage*), may exist between a *Mussulmán* and an *infidel* woman.—Hidáyah, vol. i, page 410.

DIX. Maintenance of children becomes, however, incumbent upon the father only where they possess no independent property (*o*).

(*o.*) It is to be observed, however, that what has been asserted respecting the maintenance of infant children being incumbent upon the father obtains only where the child is not possessed of any property; but where the child is possessed of property, the maintenance is provided from that, as it is a rule that every person's maintenance must be

ANNOTATIONS.

dviii. An infidel may be compelled to maintain his muslim child; and, in like manner, a muslim may be compelled to maintain his infirm infidel child.*

* Fatáwá Alamgíri, vol. i, pages 750—752.—B. Dig., pages 455—457.

LECTURE XV.

furnished from his own substance, whether he be an *infant*, or an *adult*.—Hidáyah, vol. i, page 410.

The maintenance of a boy* after he has been weaned may be taken out of his own property when he has any. If the property is not available, the father may be ordered by the Judge to maintain him, reserving his recourse against the property; but if the father should maintain him without such order, he has no such right of recourse unless he had called on witnesses at the time to attest that he reserved his remedy against the property. And if the child has lands, cloaks, or other clothes, the father may sell the whole of them, if necessary, for his maintenance.†

DX. After a child has been weaned, the judge is to assign maintenance for it agreeably to the condition of the father, and deliver it to the mother to be expended on the child. But if confidence cannot be placed in the mother, the maintenance is to be committed to some other person to be laid out for the child's benefit.†

DXI. When the father is poor and the child's paternal grandfather is rich, and the child's own property is unavailable, the grandfather may be directed to maintain him, and the amount will be a debt due to him from the father, for which the grandfather may have recourse against him; after which the father may reimburse himself by having recourse against the child's property if there is any.†

DXII. When the father is infirm and the child has no property of his own, the paternal grandfather may be ordered to maintain him without right of recourse against any one; and, in like manner, if the child's mother be rich, or the grandmother rich,

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* "Though the word (*sabí*) in the original is masculine, I think it includes female children also who have property."—Note by Mr. Baillie.

† Fatáwá Alamgírí, vol. i, page 752.—B. Dig. pp. 456 & 457.

while its father is poor, she may be ordered to maintain the child, and the maintenance will be a debt against the child if he be not infirm, but if he be so, he is not liable.*

DXIII. If the father is poor, and the mother is rich, and the young child has also a rich grandfather, the mother should be ordered to maintain the child out of her own property, with a right of recourse against the father; and the grandfather is not to be called upon to do so. When the father is poor, and has a rich brother, he may be ordered to maintain the child with right of recourse against the father.*

DXIV. When male children have strength enough to work for their livelihood, though not actually adult, the father may set them to work for their own maintenance, or hire them out, and maintain them out of their wages; but he has no power to hire females out for work or service.*

DXV. A father must maintain his female children absolutely until they are married, when they have no property of their own. But he is not obliged to maintain his adult male children unless they are disabled by infirmity or disease (*p*).

(*p*.) Though one is actually able to work, yet if work is not suitable or proper for him, he is held to be weak and unable.*

(*p*.) When an adult male who is weak or lame, or has both his hands withered so as to be unable to use them, or is insane or paralytic, has property of his own, he is to be maintained out of it; but if he has none, and his father and mother are in easy circumstances, the father is bound to maintain him.*

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* Fatáwá Alamgírí, vol. i, pp. 752 & 753.—B. Dig., pp. 456—459.

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Principle. DXVI. It is also incumbent on a father to maintain his son's wife, when the son is young, poor, or infirm.*

It is stated, however, in the Mabsút that a father cannot be compelled to maintain the wife of his son.*

Principle. DXVII. When a man is absent, but has left available property, maintenance may be ordered out of it by the judge to none other but to the following persons if they are poor, *viz.*,—his parents, his male children if young, or, though adult, if unable to gain their livelihood, his female children, whether young or adult, and his wife. If the property is in the hands of the parties themselves, the judge may direct them to take their maintenance out of it. So also when the property is in deposit with another person, or the absentee has credits owing to him, maintenance may be ordered out of the property or credits.*

Principle. DXVIII. When the absentee has left property in the hands of his parents, wife, or child, of the same kind as that to which they are entitled for maintenance, they may lawfully take it for that purpose without incurring any responsibility. But if another person in whose hands there is property of the absentee should give them maintenance out of it without the order of a judge, he would be responsible.*

Principle. DXIX. When the property which the absentee has left in the hands of his parents, wife, or child, is of a different kind from that to which they are entitled for maintenance, all are agreed that none but the father can dispose of it. A father can sell the chattels of an adult son who is absent, but he

* Fatáwá Alamgírí, vol. i, pp. 753 & 754.—B. Dig., pp. 458 & 459.

cannot sell his *ákár* or immoveable property; and he can sell both the chattels and the *ákár* of his minor or insane son who is absent on account of his own maintenance, and that of the wife and child of the absentee.*

Principle.

DXX. When a woman has compounded with her husband for the maintenance of their young children, the composition is lawful, whether the husband be rich or poor; but if it should afterwards appear that the maintenance is much in excess of what is requisite, it may be reduced, and if insufficient, it must be made up to the proper amount.*

Principle.

DXXI. When a person has died leaving property and young children, their maintenance is to be taken out of their shares in the estate. And the rule is the same with regard to all others who have any share in it; including his wife, whether she be pregnant or not. If the person has left an executor, it is his duty to maintain the minor children out of their shares, otherwise the judge should order to each of them out of his share as much as may be required for that purpose.*

Principle.

DXXII. If the person has left an executor, it is his duty to maintain the minor children out of their shares, otherwise the judge should order to each of them out of his share as much as may be required for that purpose.*

Principle.

DXXIII. When no executor has been appointed by the deceased, who has left both adult and minor children, the judge should appoint an executor; and if there be no judge, and the elder children maintain the younger out of their shares of the property, though they are legally responsible, they

* Fatáwá Alamgíri, vol. i, page 754.—B. Dig., pp. 459 & 460.

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are justifiable as between themselves and their consciences, for so meddling with the shares of the younger children.*

DXXIV. The maintenance to an adult daughter, or to an adult son who is disabled, rests upon the parents in three equal parts,—two-thirds being furnished by the father, and one-third by the mother.—Hidáyah, vol. i, page 413.

Because the inheritance of a father from the estate of his son or daughter is two-thirds, and that of the mother is one-third.—*Ibid.*, page 414

Principle Of parents.

DXXV. A child in easy circumstances (*q*) may be compelled to maintain his poor parents, whether they be muslim or not, or whether by their own industry they be able to earn anything for subsistence or not (*r*).

(*q.*) By easiness of circumstances is to be understood the possession of property equal to a *nisáb*, according to Abú Yusuf, whose opinion has been adopted for the *fatwá*. And the *nisáb* in question is that the possession of which forbids the acceptance of alms, or, in other words, a surplus of 200 *dirams* over one's own necessities.*

(*r.*) If they are to labour for a subsistence, it would subject them to pain and fatigue, from which it is the express duty of their child to relieve them; and hence it is that maintenance to parents is incumbent upon the child, although they should be able to subsist by their industry.—Hidáyah, vol. i, page 413.

Principle.

DXXVI. Where there are male and female children, or children only of the male sex, or only

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dxxvi. The maintenance to parents is equally incumbent upon a daughter, as upon a son, according to the *Záhir-ur-Rawáyit;* and this is approved, because the principle upon which the obligation of it is founded applies equally to both.—Hidáyah, vol. i, page 412.

* Fatáwá Alamgírí, vol. i, page 755.—B. Dig., pp. 460 & 461.

of the female sex, the maintenance of both parents are alike incumbent upon them.

Where there is a mixture of male and female children, the maintenance of both parents is on them alike.*

DXXVII. So, also, if a poor man has two sons, one having only a *nisáb*, and the other his superior in wealth, or one a muslim, and the other a *zimmí*, they are both equally liable*(*s*). *Principle.*

(*s.*) The maintenance of a father and mother is incumbent upon their child alone, wherefore no man can be his partner or associate in furnishing it to them, because parents have a right in the property of their child (according to various well known traditions), which they do not possess with respect to that of any other person; and also, because the child is more nearly related to his parents than to any other person whatever.—Hidáyah, vol. i, page 412.

DXXVIII. When a mother is poor, her son is bound to maintain her, though he be in straitened circumstances himself, and she not infirm. When a son is able to maintain only one of his parents, the mother has the better right; and if he have both parents and a minor son, and is able to maintain only one of them, the son has the preferable right. When he has both parents and cannot afford maintenance to either of them, he should take them to live with him, that they may participate in what food he has for himself.* *Principle.*

DXXIX. When the son, though poor, is earning something, and his father is infirm, the son should allow the father to share his food with him.* *Principle.*

DXXX. As of a father and mother, so the maintenance of grandfathers and grandmothers; if they be indigent, is incumbent upon their grand- *Principle.*

* Fatáwá Alamgírí, vol. i, pp. 755 & 756.—B. Dig., pp. 461 & 462.

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children, though the former be of a different religion (*t*).

(*t*.) For his father and mother, because the text of the *Kurán*, upon this point, was revealed respecting the father and mother of a *Mussalmán*, who were infidels;—and for his grandfathers and grandmothers, because a grandfather is as a father, and a grandmother is as a mother, the former being vested with the authority of a father, in all points of guardianship and inheritance, in defect of the father, and the grandmother being the mother's substitute in defect of her, with respect to *hizanát*, and so forth: but their poverty is made a condition of the obligation, because, if they be possessed of property, their maintenance must be provided from *that*, rather than from the property of any other person: and difference of religion is no objection, with respect to grandparents, because of the text abovementioned: it is to be observed, however, that in the case of difference of religion, a man is under no obligation to provide maintenance for any except his wife, his parents, grandparents, children, and grandchildren, to all of whom it is due, notwithstanding this circumstance.—Hidáyah, vol. i, pages 411 & 412.

'A grandparent is entitled to maintenance on the sole condition of being poor, as in the case of a father; and a grandfather on the mother's side is like a grandfather on the father's side; and grandmothers on either side are also entitled to maintenance, they being in this respect like grandfathers.*

Principle. DXXXI. If an absent son be possessed of property, a maintenance to his parents is to be decreed out of it, for the reasons already mentioned.—Hidáyah, vol. i, page 416.

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dxxx. It is incumbent upon a man to provide maintenance for his father, mother, grandfathers, and grandmothers, if they happen to be in necessitous circumstances, although they be of a different religion.—Hidáyah, vol. i, page 411.

* Fatáwá Alamgíri, vol. i, page 756.—B. Dig., pp. 461 & 462.

DXXXII. The parents of an absentee may take their maintenance out of his effects, but a trustee cannot provide without a decree (*u*). *Principle.*

(*u.*) If the effects of an absent son be in the hands of his parents, and they take their maintenance from them, they are not responsible, as what they take in this manner is their right, a maintenance being their due, independent of any decree from the Kází; but if the effects be in the hands of a stranger, and he furnish the maintenance to the parents therefrom, without a decree from the Kází, he is responsible, as he in that case takes upon him to dispose of the property of another without authority, since he is no more than merely the absentee's agent for conservation.—Hidáyah, vol. i, pages 416 & 417.

DXXXIII. It is a man's duty to provide maintenance for all his infant male relations within prohibited degrees, who are in poverty; and also to all female relations within the same degrees, whether infants or adults, where they are in necessity; and also to all adult male relations within the same degrees who are poor, disabled or blind; but the obligation does not extend beyond those relations (*v*).—Hidáyah, vol. i, pages 412 & 413. *Principle.* Of other relatives.

(*v.*) Because the duties of consanguinity are not absolutely incumbent towards any excepting the nearer degrees of kindred, and do not extend to the more *distant* degrees, as this would be impracticable: on this occasion, moreover, the *necessity* is made a condition of the obligation; and tenderness of sex, or extreme youth, or debility, or blindness, are evidences of this necessity, since persons from these circumstances are rendered incapable of earning their subsistence by labour; but this rule does not apply to parents, for if they were to labour for a subsistence, it would subject them to pain and fatigue, from which it is the express duty of their child to relieve them.—Hidáyah, vol. i, page 413.

DXXXIV. Maintenance is due to a relation within the prohibited degree in proportion to inheritance; in other words, upon him who has the

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greatest part of inheritance in the said relation's estate, the largest proportion of maintenance is incumbent, and upon him who has the smallest right, the smallest portion, and so of the others.—Hidáyah, vol. i, page 413.

Because it is said in the *Kurán*—"The maintenance of a relation within the prohibited, degrees rests upon his heir," and the word '*heir*' shows that, in adjusting the rate of maintenance, the proportion of *inheritance* is to be regarded.—Hidáyah, vol. i, page 413.

The maintenance of a brother in poverty rests upon his *full* paternal and maternal sisters, in five shares, according to their degrees of inheritance; that is to say, three-fifths must be furnished by the full sisters, one-fifth by the paternal sisters, and one-fifth by the maternal.—Hidáyah, vol. i, page 414.

The liability of a person to maintain these relatives is in proportion to his share in their inheritance, not (of course) his actual share, for no one can have any share in the inheritance of another till after death, but his capacity to inherit. And this rule is applicable only among persons who are equal in respect of propinquity.*

Principle. DXXXV. No adult male, if in health, is entitled to maintenance though he is poor; but a person is obliged to maintain his adult female relatives though in health of body, if they require it. The maintenance of a mere relative is not incumbent on any poor person; contrary to the maintenance of a wife and child, for whom poor and rich are equally liable.*

Among the relatives within the prohibited degrees, the liability for maintenance is regulated thus:—

Principle. DXXXVI. When a poor person has a father and a son's son, both in easy circumstances, the father is liable for his maintenance; and when there is a daughter and a son's son, the daughter only

* Fatáwá Alamgírí, vol. i, page 756.—B. Dig., page 463.

is liable, though they both divide the inheritance between them. So also, when there is a daughter's daughter, or daughter's son, and a full brother, the child of the daughter, whether male or female, is liable, though the brother is entitled to the inheritance. When a person has a parent and a child, both in easy circumstances, the latter is liable, though both are equally near to him. But if he have a grandfather and a son's son, they are liable for his maintenance in proportion to their shares in the inheritance, that is, the grandfather for a sixth, and the son's son for the remainder. If a poor person has a Christian son and a Muslim brother, both in easy circumstances, the son is liable for the maintenance though the brother would take the inheritance. If he has a mother and grandfather, they are both liable in proportion to their shares as heirs, that is, the mother in one-third, and the grandfather in two-thirds. So, also, when with the mother there is a full brother, or the son of a full brother, or a full paternal uncle, or any other of the *asabah* or residuaries, the maintenance is on them by thirds according to the rules of inheritance. When there is a maternal uncle and the son of a full paternal uncle, the liability for maintenance is on the former, though the latter would have the inheritance; because the condition of liability is wanting on the latter, who is not within the forbidden degrees.*

And among the remote relatives, the liability for maintenance is regulated as follows :—

DXXXVII. If a man have a paternal uncle and aunt, and a maternal aunt, his maintenance is on the uncle; and if the uncle be in straitened circumstances, it is on both the others. The principle in *Principle.*

* Fatáwá Alamgíri, vol. i, page 756.—B. Dig., pp. 463–465.

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this case is, that when a person who takes the whole of the inheritance is in straitened circumstances, his inability is the same as death, and being as it were dead, the maintenance is cast on the remaining relatives in the same proportions as they would be entitled to in the inheritance of the person to be maintained, if the other were not in existence; and that when one who takes only a part of the inheritance is in straitened circumstances, he is to be treated as if he were dead, and the maintenance is cast on the others, according to the shares of the inheritance to which they would be entitled if they should succeed togetherwith him.*

It is to be observed, however, that—

DXXXVIII. To the obligation of furnishing maintenance to a poor relation, the *capability* of inheritance only is a condition, and not the *prior* or *more immediate right.*

Thus if a poor man have a rich maternal aunt, and also a rich paternal uncle's son, his maintenance rests upon the *former* in preference to the latter, although the *latter* would inherit of him in preference to the *former*, for this reason, that a maternal aunt is within the prohibited degrees, whereas a cousin-german is not.—Hidáyah, vol. i, page 414.

Consequently,—

DXXXIX. The maintenance of a relation within the prohibited degrees excepting a wife, both parents, grandfathers and grandmothers, a child and son's

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dxxxix. Maintenance is not due where there is a difference of religion, excepting to a wife, both parents, grandfathers and grandmothers a child and the child of a son, as already mentioned.—*Vide* Fatáwá Alamgírí, vol. i, page 759.—B. Dig., page 466.

* Fatáwá Alamgírí, vol. i, page 757.—B. Dig., pp. 463—465.

child (as already mentioned) is not incumbent upon his heirs, if they be of a different religion, because, in this case, they are incapable of inheriting from him, which is the condition of the obligation.

There is no obligation upon a *Christian* to provide maintenance to his brother, being a *Mussalmán;* neither is a *Mussalmán* under any obligation to provide for the maintenance of his brother, being a *Christian;* because (according to what appears in the sacred text) maintenance is connected with inheritance; and as a *Mussalmán* and *infidel* cannot inherit of each other, it follows that the maintenance of either is not incumbent upon the other.—Hidáyah, vol. i, page 412.

A Christián is not liable for the support of his Muslim brother, nor a Muslim liable for the maintenance of his Christian brother.—Fatáwá Alamgírí, vol. i, page 759.—B. Dig., page 466.

DXL. If the judge (*Kází*) decree maintenance to children, or to parents, or to relations, within the prohibited degrees, and some time should elapse without their receiving any, their right to maintenance ceases.

Because it is due only so far as may suffice, according to their necessity, and they being able to suffer a considerable portion of time to pass without demanding or receiving it, it is evident that they have a sufficiency, and are under no necessity of seeking a maintenance from others: contrary to where the Kází decrees a maintenance to a wife, and a space of time elapses without her receiving any, for her right to maintenance does not cease on account of her independence, because it is her *due,* whether she be *rich* or *poor.*—Hidáyah, vol. i, page 417.

What has been observed on this occasion applies to cases only in which the Kází has not authorized the parties to provide themselves a maintenance upon the absentee's credit.—*Ibid.*

DXLI. But where the *Kází* has so authorized them, their right to maintenance does not cease in

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consequence of a length of time (*m*) passing without their receiving any (*n*).

(*m*.) The time here meant is any term beyond a *month*; and if the time elapsed be short of that term, maintenance does not cease.—Hidáyah, vol. i, page 417.

(*n*.) Because the authority of the Kází is universal, and hence his order to provide a maintenance upon credit is equal to that of the absentee himself, wherefore the proportion of maintenance for the time so elapsed is a debt upon the absentee, and does not cease from that circumstance.—*Ibid.*

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ON MINORITY AND GUARDIANSHIP.

DXLII. A person becomes an adult on the expiration of the fifteenth year of his or her age; but if any of the symptoms of puberty appear at an earlier age majority commences therewith (*a*). *Principle.*

(*a.*) The puberty of a boy is established by his becoming subject to nocturnal emission, his impregnating a woman, or emitting in the act of coition; and if none of these be known to exist his puberty is not established, until he have completed his eighteenth year. Puberty of a girl is established by menstruation, nocturnal emission, or pregnancy; and if none of these has taken place, her puberty is established on the completion of her seventeenth year. What is here advanced is according to Abú Hanífah. The two disciples (Abú Yusuf and Muhammad) maintain that upon a boy's as well as a girl's completing the *fifteenth* year, they are to be declared adult. There is also one report of Abú Hanífah to the same effect.—*Vide* Hidáyah, vol. iii, pages 482 & 483.

The opinion of the two disciples corroborated by the latter report from their master, as well as by the opinion of Sháfií and others is taken to be the law as respects the second point; and there is no difference of opinion with respect to the first.

It is expressly laid down in the Durr-ul-Mukhtár that 'the puberty of a boy is (established) by his (becoming subject to) nocturnal emission, his impregnating a woman, or emitting in the act of coition; and that of a girl, by nocturnal emission, menstruation, or pregnancy. But if none of these be known to exist in them, then until they complete the *fifteenth* year; and *according to this decision is given.*—Durr-ul-Mukhtár, pages 685 & 686.

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So also in the Jámi-ur-Ramúz :—"The majority of a boy is established upon (his being subject to) nocturnal emission, or his impregnating a woman, or emitting in the act of coition; and that of a girl, upon nocturnal emission, menstruation or pregnancy; but if none of these is found in them, then upon their completing the *fifteenth* year. *According to this decision is given**.—Jámi-ur-Ramúz, vol. iv, page 721.

It is to be observed that the earliest age (for the appearance of the symptoms) of puberty with respect to a boy is twelve years, and with respect to a girl is nine years.†—Hidáyah, vol. iii, page 483.

Principle. DXLIII. When a boy or girl approaches the age of puberty, and they declare themselves adult, and

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dxliii. When a boy or girl approaches the age of puberty, and they declare themselves adult, their declaration must be credited, and they become subject to all the rules affecting adults, because the attainment of puberty is a matter which can only be ascertained by their testimony; and consequently when they notify it, their notification must be credited in the same manner as the declaration of a woman with respect to her courses.—Hidáyah, vol. iii, page 483.

* The author of the Hidáyah also is of this opinion, as it is manifest from his citing, as above, the opinion of the two disciples *after* that of their master, Abú Hanífah. See the Introductory Discourse, page 42. Annotations.

Sir William Macnaghten, however, says: "All persons, whether male or female, are considered minors, until after the expiration of the *sixteenth* year, unless symptoms of puberty appear at an earlier period." (Macn. M. L., Chap. viii, Princ. 1.) But as he does not show upon what authority he was warranted in fixing minority until after the expiration of the sixteenth year, and as there seems to be no authority to support his *dictum*, it must be taken to be erroneous, and could not be adopted in the face of the paramount authorities above cited; more especially when the precedent quoted by the learned writer himself in the second part of his work fixes minority to the end of the *fifteenth*, and not the sixteenth, year. The essential part of the precedent just alluded to is as follows :—"If a girl exhibit certain signs of womanhood at the age of nine, ten, eleven, or up to fourteen years old, she is, in the language of the law, denominated 'bálighah bil alámat' or adult by (symptoms of) puberty. Should she exhibit none of these signs up to her fourteenth year yet on her attaining the age of *fifteen* years, she will be deemed an adult, and in the language of the law, she will be termed 'baligiah ba-sin' or adult by (the year of) majority."—Macn. Prec., M. L., Chap. vi, Case 17.

† The earliest age of puberty with respect to a boy is twelve years, and with respect to a girl nine years.—Durr-ul-Mukhtár, page 686.

their outward appearance indicates nothing to the contrary their declaration must be credited, and thence they will become subject to all laws affecting adults.

Held, on the opinion of the Kází-ul-Kuzát, that when a Muhammadan girl approaches the age of puberty, and publicly declares herself to be adult, and her outward appearance indicates nothing to the contrary, her declaration must be credited, for then she then becomes subject to all the laws affecting adults.—Shamsoon-nissa Begum *versus* Ashruf-oon-nessa and others. The 21st of May 1840.—2 Sev. Cases, 299. *Vide* Morl. Dig., vol. i, page 303. Precedent.

A mere infant is called a "Sabí," while the young person who has nearly attained majority is distinguished by the appellation of 'Murâhik.'* Minors have not, however, different privileges at different ages of their minority, as in the English law and Hindú law.

DXLIV. A minor is not competent *sui juris* to do any civil act which is unlawful if done without authority from his guardian, but valid if assented to by him (*b*). *Principle.*

(*b.*) The acts† of an infant are not lawful unless authorized by his guardian. The acts of an infant are unlawful,

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dxliv. No contract entered into, nor acknowledgment made, by an infant or lunatic is valid, for the reasons before assigned; and in the same manner divorce or manumission pronounced by them does not take place.—Hidáyah, vol. iii, page 469.

* There is a subdivision of the state of minority though not so minute as in the civil law. The term 'minor' being used indiscriminately to signify all persons under the age of puberty, but the term 'Sabí' is applied to persons in a state of infancy, and the term 'Murâhik' to those who have nearly attained puberty.—Macn. M. L., Chap. viii, Princ. 2.

A person after attaining the age of majority is termed 'Shaab' till the age of 34 years; he is termed 'Kohal' until the age of fifty-one, and 'Shaikh' for the remainder of his life.—*Ibid.* Note.

† Arabic "Tasarrufát," meaning transactions, such as purchase, sale, and so forth.

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because of the defect in his understanding; but the licence or authority of his guardian is a mark of his capacity; whence it is that in virtue thereof an infant is accounted the same as an adult.—Hidáyah, vol. iii, page 469.

Principle. DXLV. If a slave, an infant, or lunatic should sell or purchase any article knowing at the time the nature of purchase and sale, and intending one or other of those, the guardian or other immediate superior has it at his option either to give his assent if he see it advisable, or to annul the bargain.—*Ibid.*, pages 469 & 470.

Principle. DXLVI. Minors, however, are not incompetent to do such acts as are manifestly for their benefit: thus a minor can receive gifts and become the proprietor of the property bestowed in gift, though the right to take possession for him of the property belongs to his guardian (*c*). See the Lecture on Gifts.

(*c.*) The donee, when competent to take possession, has the right to take it. When he is a minor, or insane, the right to take possession for him belongs to his guardian, who is, first his father, then his executor, then his grandfather, then his executor, next the judge and the person appointed by him. It is alike whether the minor be in the family of any of these persons or not.—Fatáwá Alamgírí.—B. Dig., page 503.

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dxliv—dxlvi. A minor is not competent *sui juris* to contract marriage, to pass a divorce, to manumit a slave, to make a loan, or contract a debt, or to engage in any other transaction of a nature not manifestly for his benefit, without the consent of his guardian.—Macn. M. L., Chap. viii, Princ. 12.

dxlvi. A bequest to or for a child in the womb, if born within six months from the date of the bequest, is valid.—Fatáwá Alamgírí, vol. vi, page 142.—B. Dig., page 617.

But he (the minor) may receive a gift, or do any other act which is manifestly for his benefit.—Macn. M. L., Chap. viii, Princ. 13.

DXLVII. If an infant or lunatic destroy any thing he is liable to make a recompense, in order that the right of the owner may be preserved.—Hidáyah, vol. iii, page 471. *Principle.*

DXLVIII. Debts contracted by a guardian for the use of his ward must be discharged by him on his coming of age.—*Ibid.*, vol. iv, page, 215. *Principle.*

Guardians are natural, testamentary and appointed. And guardianship over a minor is for the purpose of matrimony, care of his person, and management of his property. Guardianship in marriage has been already treated of,* and that for the care of the minor's person will be hereafter inculcated.† Different kinds of guardians.

DXLIX. The guardianship of a minor for the management and preservation of his property devolves *Principle.*

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dxlvii. Minors are civilly responsible for any intentional damage or injury done by them to the property or interests of others; though they are not liable in criminal matters to retaliation or to the *ultimum supplicium*, but they are liable to discretionary chastisement and correction.—Macn. M. L., Chap. viii, Princ. 16.

dxlviii. The necessary debts contracted by any guardian for the support and education of his ward must be discharged by him on his coming of age.—*Ibid.*, Princ. 11.

dxlviii, dxlix. They (the guardians) are also near and remote. Of the former description are fathers and paternal grandfathers, and their executors and the executors of such executors. Of the latter description are the more distant paternal kindred; and their guardianship extends only to matters connected with the education and marriage of their wards.—Macn. M. L., Chap. viii, Princ. 5.

The former description of guardians answers to the term of Curator in the civil law, and of Manager in the Bengal code of Regulations; having power over the property of the minor for purposes beneficial to him; and in their default this power does not vest in the remote guardians, but devolves on the ruling authority.—*Ibid.*, Princ. 6.

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* See *ante*, pages 320—325. † See post, pages 485 *et seq.*

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first on his or her father, then on the father's executor,—next on the paternal grandfather, then on his executor, then on the executors of such executors,*—next on the ruling power or his representative, the Kází or Judge (*d*).

(*d.*) The executor of a father is in the place of a father. So also the executor of a grandfather is in the place of a father's executor, and the executor of a grandfather's executor is in the place of the grandfather's executor. And the executor of a judge's executor is in the place of the judge's executor when his appointment was general.—Fatáwá Alamgírí, vol. vi, page 223.—B. Dig., page 677.

Principle. DL. In default of a father, father's father, and their executors, as above, all of whom are termed near guardians, it rests in the Government, or its representative, to appoint a guardian of an infant's property.

Principle. DLI. The other paternal kinsmen, who are termed remote kindred, and the mother succeed,

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dl, dli. According to Vikáyah, "the paternal relation is the guardian according to his proximity in point of inheritance." The care of the property legally devolves, first on the father and his executor, next on the paternal grandfather and his executor, next the right of nomination rests in the ruling power, and his administrator: that is to say, any person whom the Government may please to appoint to the custody of the infant's property, is a legal guardian; according to the authority above quoted—"First, his father, or the executor of the father, is his guardian, then the paternal grandfather, or his executor, then the magistrate or his executor."—Manc. Prec. M. L., Chap. vii, Case I.

dli. The paternal relations succeed to the right of guardianship, for the purposes of education and marriage, in proportion to the proximity of their claims to inherit the estate of the minor.—Macn. Prec. M. L., Chap. viii, Princ. 10.

* An executor duly constituted is considered the guardian of the testator's minor children.—*Vide* page 480.

according to proximity, to the guardianship of an infant, for the purpose of education and marriage ;* they have no right to be guardians of his property, unless appointed to be so by the ruling authority, or in the original proprietor's will, proved by competent witnesses.

Precedent. The mother, and the paternal uncle, and the maternal uncle, have no legal title to the guardianship of the property of the minors, as they do not come within the class of persons above mentioned. The alleged appointment by the mother is nugatory, because, having no right of guardianship herself, she cannot convey such right to another. If the alleged appointment of the maternal uncle, in the will of the original proprietor, be proved by competent witnesses, he will be legally entitled to the guardianship of minors. If not proved, it will remain with the ruling power to nominate a guardian.—Macn. Prec. M. L., Chap. vii, Case I.

Precedent. A person is legally competent to commit the guardianship of his infant daughter to the mother of such infant she being his wife. This doctrine is upheld by various authorities, especially by the Hidáyah in the Chapter treating of Gifts.†—Macn. Prec. M. L., Chap. vii, Case 4.

Principle. DLII. The mother's right of guardianship is, however, forfeited upon her being remarried to a stranger, but regained when she is divorced by him, and has again become a widow.‡

ANNOTATIONS.

dlii. The mother's right is forfeited by marrying a stranger, but reverts on her again becoming a widow.—Macn. M. L., Chap. viii, Princ. 9.

* Fatáwá Alamgírí, vol. i, page 399.—B. Dig., page 46. See Shafh-ul-Vikáyah, see also *ante*, pages 329, 330.

† Had there been no appointment, the mother would have been entitled to the custody only of her child, until its attaining a certain age. The doctrine laid down in this case merely tends to establish the fact that the mother is equally eligible with others to be nominated guardian.—Note by Sir William Macnaghten.

‡ See *post*, page 487.

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Principle. DLIII. In default of the mother as well as of the paternal kindred of a minor, his maternal relations are, according to proximity, entitled to guardianship for the purposes of education and marriage: and not for the management of his property, unless so appointed in the late owner's will, or by the ruling power. (See the precedent in last page).

Principle. DLIV. Any other relation also, if constituted an executor by the late owner, becomes the guardian of his infant child.

Precedent. It appears from the petition presented by the wife and the brother of the son-in-law of the deceased, that he (the deceased) committed to them the care of his infant children, and made over to them his entire property in trust for the support of those children. They are, therefore, according to the Muhammadan law, executors of the deceased to all intents and purposes; as is laid down in the Sharh-i Vikáyah,—"He to whom the father has entrusted the disposal of his family and fortune is his executor." An executor duly constituted must be considered the guardian of his son; as appears from a passage in the Vikáya,—"The guardianship of a minor legally belongs first to the father, next to his executor, next to the paternal grandfather." A suit instituted by two executors conjointly, or by either of them separately, for the right of an orphan, is maintainable in law.—Macn. Prec. M. L., Chap. vii, Case 7.

As respects the power of a guardian over his ward's property,—

Principle. DLV. The general rule is, that a guardian, executor, or any one who has the care of the person and property of a minor, can enter into a contract

ANNOTATIONS.

dliii. Maternal relations are the lowest species of guardians, as their right of guardianship for the purposes of education and marriage takes effect only where there may be no paternal kindred nor mother.—Macn. M. L., Chap. viii, Princ. 7.

which is, or likely to be, advantageous, and not injurious, to his ward.*

However,—

DLVI. A guardian may sell or purchase moveables on account of his ward either for an equivalent, or at such a rate as to occasion an inconsiderable loss, but not at such a rate as to make the loss great and apparent (*d*).—*Vide* Hidáyah, vol. iv, page 553. *Principle.*

(*d.*) Because the appointment of an executor being for the benefit of the orphan, he must avoid losses in as great a degree as possible; but with respect to an inconsiderable loss, as in the commerce of the world it is often unavoidable, it is, therefore, allowed to him to incur it, since otherwise a door would be shut to the business of purchase and sale.—Hidáyah, vol. iv, page 553.

DLVII. A guardian is allowed to borrow money for the support and education of his ward even by pawning the minor's property: the debt so contracted must be paid out of his (the minor's) estate, or by him when he comes of age (*e*). *Principle.*

(*e.*) If a guardian purchase victuals or apparel for the use of his ward, and, having debited him for the price, take in pawn part of his goods as a security for the debt, it is valid; for, as he is permitted to borrow for the *use* of the orphan, and as taking a pawn is like the discharge of a claim, it is in consequence legal. Besides, as it is lawful for a guardian to trade on account of his ward, it follows that it is also lawful for him to give and receive pawns, they being similar to receipts and payments.—Hidáyah, vol. iv, page 215.

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dlvii. Necessary debts contracted by any guardian for the support and education of his ward must be discharged by him on his coming of age.—Macn. M. L., Chap. viii, Princ. 11.

* *Vide* Macn. Prec. M. L., Chap. viii, Case 2.

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However,—

Principle. DLVIII. It is not lawful for a guardian to pledge into his own hands goods belonging to his ward on account of a debt due to *him*, or into the hands of his child being an infant, or into the hands of his slave being a merchant and free from debt.—Hidáyah, vol. iv, page 214.

For a guardian, being merely an *agent*, cannot of course have a double capacity in contracts. A guardian, moreover, is more deficient in tenderness than a father, and therefore cannot, like a father, stand in a double capacity in making contracts.—Hidáyah, vol. iv, page 214.

Principle. DLIX. A father can pawn the goods of his infant child into his own hands for a debt due from the child, or into the hands of another of his children being an infant (*f*).

(*f.*) If a father pawn the goods of his infant child into his own hands for a debt due from the child, or into the hands of another of his children being an infant, or of his slave, being a merchant and not in debt, it is lawful; because a father, on account of the tender affection which he is naturally supposed to have for his child, is considered in a double capacity, and his bare inclination as equivalent to the assent of both parties; in the same manner as where a father sells the property of his infant child to himself.—Hidáyah, vol. iv, page 214.

Principle. DLX. A father may also pawn on account of *his own debt* the goods belonging to his minor son who on coming of age will redeem the goods discharging the debt, and have a claim on the father for the sum.

If a father pawn the goods of his son on account of his own debt, and the son, by a discharge of the debt, redeem the same, he has a claim on the father for the sum; for it was necessary that the son should discharge the debt, having occasion to release his goods out of the hands of the pawnee.—Hidáyah, vol. iv., page 215. So,—

DLXI. The contract of pawn entered into by a father with respect to his minor child's goods can not be annulled by the minor, even if it were not for his own debt or for his own benefit (*g.*) *Principle.*

(*g*) If a father pawn the goods of his infant son, and the infant attain maturity, still he is not at liberty to annul the contract of pawn and take back the pledge until he shall have discharged the debt; for the contract is binding upon him; as the act of a father on behalf of his infant child is binding upon the child after he shall have attained maturity, a father being his infant child's substitute.—Hidáyah, vol. iv, page 215.

DLXII. It is lawful for a father to pawn the goods of his son for a debt jointly due by both. If, therefore, the pledge be destroyed, the father must compensate to the son by the payment of a sum equivalent to his [the father's] share of the debt. *Principle.*

Because he has paid off so much by means of the son's property.—Hidáyah, vol. iv, page 216.

The same rule also holds with a grandfather, or a guardian, in case of the non-existence of the father.—Hidáyah, vol. iv, page 216.

DLXIII. It is lawful for a father to sell his minor child's property either for an equivalent or at (some) reduced price, but not otherwise.—Durr-ul-Mukhtár, page 846. *Principle.*

All this* respects moveable property.—*Ibid.*

In the case of a contract where there is a possibility of loss, it has been held that a near guardian (by which is meant a father or grandfather, or guardians duly appointed by them) is at liberty to enter into it, but that a remote guardian, such as an uncle or a brother, is not at liberty to enter into such contract on behalf of the minor. Where, however, nothing but loss can accrue to the minor, it is not legal for *any* guardian,—near or remote,—or for any *Precedent.*

* That is *this* and all that are mentioned previous to this.

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executor, or other person under whose care he is, to act on his behalf.—Macn. Prec. M. L., Chap. vii, Case 2.

As respects a minor's immoveable property, his guardian is incompetent to sell it, except under the following circumstances:—

Principle.

DLXIV. An executor or guardian is allowed to sell his minor ward's immoveable property, not to himself, but a stranger—for double the value of the property,—or for the benefit of the minor,—or for (liquidation of) the debts of the deceased (proprietor),—or where there are (some) general provisions in the (late incumbent's) will which cannot be carried into effect without selling (the property),—or where the produce of the property does not exceed the expense (of keeping it),—or where it is in danger of being destroyed, damaged or decayed,—or where it is in the hands of an usurper (and there is apprehension of its not being recovered*).—Durr-ul-Mukhtar, pages 846 & 847; so also the Jámi-ur-Ramúz and Fátawá Alamgíri. *Vide* Wills and Executorship.

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dlxiv. A guardian is not at liberty to sell the immoveable property of his ward except under seven circumstances, *viz.*, 1*st*, where he can obtain double its value; 2*ndly*, where the minor has no other property, and the sale of it is absolutely necessary to his maintenance; 3*rdly*, where the late incumbent died in debt, which cannot be liquidated but by the sale of such property; 4*thly*, where there are some general provisions in the will which cannot be carried into effect without such sale; 5*thly*, where the produce of the property is not sufficient to defray the expense of keeping it; 6*thly*, where the property may be in danger of being destroyed; 7*thly*, where it has been usurped, and the guardian has reason to fear that there is no chance of fair restitution.—Macn. M. L., Chap. viii, Princ. 14.

* The portion within parenthesis is from the Radd-ul-Muhtár, a very copious Commentary on the Durr-ul-Mukhtár. See Introductory Discourse, page 46.

If the joint property of A, B, and C was real, that is to say, consisted of lands, the sale by A and B of C's portion is illegal, notwithstanding the fact of their having the care of his person and property, unless under certain circumstances, (viz.,)—unless the minor's share can be sold for double its value, unless there are no means of supporting him without having recourse to a sale of his property, unless the lands be in imminent danger of being lost, or unless with a view to save the minor's property from usurpation, or unless some similar emergency exist.—Macn. Prec. M. L., Chap. vii, Case 2.

Precedent.

DLXV. If a father or grandfather sell the property of a minor at the proper price, the sale is valid provided it be with no fraudulent intention ;* otherwise the sale of *akár* or immoveable property is invalid ; and (there are two traditions regarding the sale of moveables; but) the decision is that the sale of moveable property with a fraudulent intention is invalid.—Durr-ul-Mukhtár, page 850.

Principle.

DLXVI. The mother is, of all the persons, the best entitled to the custody of her infant child during marriage and after separation from her husband,† unless she be an apostate (*a*), or wicked (*b*), or unworthy to be trusted.‡

Principle.

Of *hizánat* or custody of infants.

(*a.*) If she is an apostate it makes no difference whether she have joined herself to the hostile country (*dár-ul-harb*) or not; because she is kept in prison till she

ANNOTATIONS.

dlxv. If a separation take place between a husband and wife, who are possessed of an infant child, the right of nursing and keeping it rests with the mother.—Hidáyah, vol. i, page 385.

* See *ante*, pages 460 & 463.

† The mothers have the right (and widows *durante viduitate*) to the custody of their sons until they attain the age of seven years, and of their daughters until they attain the age of puberty. The mother's right is forfeited by marrying a stranger, but reverts on her again becoming a widow.—Macn. M. L., Chap. viii, Princ. 8 & 9.

‡ Fatáwá Alamgírí, vol. i, page 728.—B. Dig., page 431.

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return to the faith.—When she has repented her title revives.*

(*b.*) Wickedness which disqualifies a mother for the custody of her child is such wickedness as may be injurious to it,—adultery, or theft, or the being a professional singer or mourner. And a person is not worthy to be trusted who is continually going out and leaving her child hungry.*

Principle.

DLXVII. Next the mother's mother, how high soever, is entitled to the custody of a child, failing her by death, or marriage to a stranger (*c*), the full sister is entitled, failing her by death or marriage to a stranger (*c*), the half sister by the mother. On failure of her in the same way, the daughter of the full sister, then the daughter of the half sister by the mother. Next the maternal aunt in the same way, and then the paternal aunts also in like manner (*c*).*

The principle in this kind of relationship being that the custody of an infant belongs of right to the mother's relations, and those on her side are preferred to those who are related to the child only by its father.*

ANNOTATIONS.

dlxvii. If the mother of an infant die, the right of *hizánat* (or the infant's care) rests with the maternal grandmother, in preference to the paternal grandmother, because it originates in, and is derived from, the mother; but if she be not living, the paternal grandmother has then a right prior to any other relation, she being as one of the children's mothers. If there be no grandmother living, in this case, a sister is preferable to either a maternal or paternal aunt, as she is the daughter of the father and mother, or one of them. A full sister also has preference to a half sister, paternal or maternal, and maternal sister to a paternal sister; because the right of *hizánat* is derived to them through the mother. The maternal aunt has preference to the paternal aunt, because precedence is given, in this point, to the maternal relation.—Hidáyah, vol. i, pages 386 & 387.

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* *Vide* Fatáwá Alamgíri, vol. i, pp. 728, 729.—B. Dig., pp. 431 & 442.

(c.) The rights of all the women before mentioned are made void by marriage to a stranger. But if they are married to relations of the infant within the prohibited degrees, as, for instance, when his grandmother is married to his grandfather, or his mother to his paternal uncle, the right is not invalidated. And when the right of a person drops by marriage, it revives on the marriage being dissolved. When a woman is repudiated revocably, her right does not revive till after the expiration of her *iddat*, because till then the husband's power over her still exists.—Fatáwá Alamgírí vol. i, p. 229.—B. Dig., p. 432.

Any woman whose right of *hizánat* is annulled by her marrying a stranger recovers the right by the dissolution of the marriage, the objection to her exercise of it being thereby removed.—Hidáyah, vol. i, page 387.

DLXVIII. An *umm-iwalad* (or a female slave who has borne a child to her master), when emancipated, obtains the right of taking her child* (*d*). *Principle.*

(*d.*) If a man contract his female slave, or *umm-iwalad*, in marriage to any person, and she bear a child to her husband, and the master afterwards emancipate her, she then becomes (with respect to the child,) as a free woman;—that is, upon becoming free she obtains her right of *hizánat* which had not existed whilst she was a slave, because her service, as a slave, would necessarily interfere with the proper discharge of the duties of *hizánat*.—Hidáyah, vol. i, page 389.

DLXIX. When it is necessary to remove a boy from the custody of women, or there is no *Principle.*

ANNOTATIONS.

dlxviii. The paternal relations succeed to the right of guardianship, for the purpose of education and marriage, in proportion to proximity of their claims to inherit the estate of the minor.—Macn. M. L., Chap. viii, Princ. 10.

* An absolute slave, an *umm-i-walad*, and a *mudubbarah* have no right to the custody of a child. But a *mukátabah* is entitled to the custody of her own child if it was born after the *kitábat*. If born before the *kitábat*, she has no right to its custody.—B. Dig., pp. 432 & 433. See *ante*, p. 275. Note.

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woman of his own people to take charge of him, he is to be given up to his agnate male relatives (*asabah*). Of these, the father* is the first, then the paternal grandfather, how high soever; then the full brother, then the half brother by the father; then the son of the full brother; then the son of the half brother by the father; then the full paternal uncle; then the half paternal uncle by the father; then the sons of paternal uncles in the same order. But though a boy may be given up to the son of his paternal uncle, a girl should not be entrusted to him. No male has any right to the custody of a female child but one who is within the prohibited degrees of relationship to her; and an *asabah* who is profligate has no right to her custody.†

If there be no woman to whom the right of *hizánat* appertains, and the *men* of the family dispute it, in this case, the nearest paternal relation has the preference, he being the one to whom the authority of guardian belongs.—Hidáyah, vol. i, page 387.

Principle. DLXX. A female's custody of a boy terminates when he is seven years old, and of a girl at her puberty.

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* An illegitimate child (*walad-uz-zinâ*) has properly no father, and a putative father is, therefore, excluded from the custody of such a child. This point is involved in the decision of the case of Mussamat Shahjehan Begum *v.* David Munro (Reports, Sudder Dewanny Adawlut, North-Western Provinces, Vol. v, page 39), in which a question was referred to the Muhammadan Law Officer, and it is stated in the Report that the Fatwá on this point was quite decided:—"The Muhammadan Law does not allow the father to interfere with his illegitimate child, even for the purpose of education." The Court were further of opinion that the single act of cohabitation by an unmarried Mussalmán woman with a Christian did not disqualify her for the custody of her natural child. But the point of *Zinâ* (adultery *or* fornication) being a disqualification in the Muhammadan Law, does not appear to have been brought to the notice of the Court. The father might have acknowledged the child without admitting that it was the fruit of *Zinâ*, (see *ante*, pp. 221—227), and then under certain conditions its paternity would have been established, though the child might be illegitimate according to English notions.—Abstract of the Note contained in Baillie's Digest, pages 432 & 433.

† Fatáwá Alamgírí, vol. i, page 729.—B. Dig., page 433.

A mother and grandmother have the best right to the custody of a boy till he is independent of their care, and that is, till he is seven years old. Kudúrí has said, "till he is able to eat, drink, and perform his ablutions by himself." But the Fatwá is in favor of the first opinion. The mother and grandmother have the best right to the custody of a girl till she attains to puberty.—Fatáwá Alamgírí, vol. i, page 730.—B. Dig., page 434.

The right of *hizánat* with respect to a male child appertains to the mother, grandmother, and so forth, until he become independent of it himself, that is to say, become capable of shifting, eating, drinking, and performing the other natural functions without assistance; after which the charge devolves upon the father, or next paternal relation entitled to the office of guardian, because when thus far advanced, it then becomes necessary to attend to his education in all branches of useful and ornamental science, and to initiate him into a knowledge of men and manners, to effect which the father or paternal relations are best qualified.—Hidáyah, vol. i, page 388.

But the right of *hizánat* with respect to a girl appertains to the mother, grandmother, and so forth, until the first appearance of the menstrual discharge, (that is to say, until she attain the age of puberty,) because a girl has occasion to learn such manners and accomplishments as are proper to women, to the teaching of which the female relations are most competent; but after that period the charge of her property belongs to the father, because a girl after maturity requires some person to superintend her conduct, and to this the father is most completely qualified.—Hidáyah, vol. i, page 388.

DLXXI. Male custody of a *boy* continues till puberty, of a *female*, not only till puberty, but till she can be safely left to herself and trusted to take care of herself. *Principle.*

After a boy is independent of a woman's care, and a girl is adult, the *asabah* have the better right to their custody, the nearer being preferred to the more remote as already mentioned. And these are to retain the custody of the child, if a male, till he has attained to puberty;

LECTURE XVI

after which, if he is of ripe discretion, and may be trusted to take care of himself, he is to be set free, and allowed to go where he pleases. But if he cannot be trusted to take care of himself, the father should join him to himself, or keep him by him, and be his guardian.*

Principle. DLXXII. When a female has neither father nor grandfather nor any of her *asabah* to take charge of her, or the *asabah* is profligate, it is the duty of the judge to take cognizance of her condition; and if she can be trusted to take care of herself, he should allow her to live alone, whether she be a virgin or a *Sayyibah*, and if not, he should place her with some female *amín*, or trustee, in whom he has confidence; for he is the superintendent of all Muslims.†

Principle. DLXXIII. When a mother refuses to take charge of a child without hire, it may be committed to another.*

Principle. DLXXIV. A boy or girl having passed the period of *hizánat* have no option to be with one parent in preference to the other, but must necessarily thenceforth remain in charge of the father.—Hidáyah, vol. i, page 389.

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* Fatáwá Alamgírí, vol. i, page 730.—B. Dig., pages 434 & 435.

† With regard to a female, if she be a *Sayyibah*, but cannot be safely left to herself, she is not to be set free, and the father ought to keep her with himself. If, however, she may be trusted to take care of herself, her father has no right to retain her, and she should be left free to reside where she pleases. If she is adult and virgin, the guardians have a right to retain her, though there should be no apprehension of her doing anything wrong, while she is of tender age. But if more advanced in years, and of ripe discretion, and chaste, they have no right to retain her, and she may reside where she pleases. When a female has neither father, nor grandfather, nor any of her *asabah* to take charge of her, or the *asabah* is profligate, it is the duty of the Judge to take cognizance of her condition; and if she can be trusted to take care of herself, he should allow her to live alone, whether she be a virgin or a *Sayyibah*; and if not, he should place her with some female *Amín* or trustee in whom he has confidence; for he is the superintendent of all Muslims.—Fatáwá Alamgírí, vol. i, page 730.—B. Dig., page 434.

DLXXV. Before the completion of *iddat* or dissolution of marriage, the proper place of *hizánat* is that where the husband and wife live, and the former cannot take away the child out of the custody of the latter. *Principle.* *Place of hizánat.*

DLXXVI. After completion of her *iddat* and separation from her husband, a woman can take her child to the place of her nativity provided the marriage had been contracted there, or it is so near from the place of separation or husband's residence that if the husband should leave the latter in the morning to visit the child he can return to his residence before night (*e*). *Principle.*

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dlxxv. Where the husband and wife are residing is the place of *hizánat* while the marriage subsists. So that the husband cannot leave the city where they are residing, and take the child with him out of the custody of the woman. The rule is the same with respect to a *mutadda* who cannot lawfully go away whether she take away her child with her or not; and the husband cannot oblige her to go.—Fatáwá Alamgírí, vol. i, page 735.—B. Dig., page 430.

When a separation has taken place between a husband and wife, and her *iddat* has expired, she may take her child to her city if the marriage took place there. But she cannot do so if the marriage did not take place in her own city, unless the city be so near the place of separation that if the husband should leave the latter in the morning to visit the child he can return to his own house before night. Nor can she go to any other city than that in which the contract took place on any other conditions. And the same rule is applicable to different places in the same city.—*Ibid.*

dlxxvi. If a divorced woman be desirous of removing with her child out of a city, she is not at liberty to do it; but yet if she remove with her child out of a city and go to her native place where the contract of her marriage was executed, in this case her removal is lawful.—Hidáyah, vol. i, page 390.

If a divorced woman be desirous of removing with her child to a place which is not the place of her nativity, but in which her marriage contract was executed, she is not at liberty to do it. This is demonstrated by Kadúrí in his compendium, and also accords with what is related in the Mabsút.—Hidáyah, vol. i, page 390.

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(*e.*) To the propriety of the woman carrying her child from one place to another, two points are essentially requisite,—one, that she be a *native* of the place to which she goes; and the other, that her marriage contract has been there *executed.* This, however, means only where the places are considerably distant; but if they be so near that the father may go to see his child and return the same night, there is no objection to the wife going to the place with the child, and there remaining; and this whatever be the size and degree of the places, whether cities or villages; nor is there any objection to her removing from the village to the city or chief town of a district, as this is in no respect injurious to the father, and is advantageous to the child, since he will thereby become known and acquainted with the people of the place; but the reverse [that is, her removal from the city to a village] would be injurious to the child, as he would thereby be liable to acquire the low manners and mean sentiments of villagers; wherefore a woman is not at liberty to carry her child from a city to a village.—Hidáyah, vol. i, page 391.

Principle DLXXVII. There is also no objection to her removing with the child from a village to the city or chief town of the district, the same being advantageous to the child, and in no respect injurious to the father.*

Principle. DLXXVIII. If the child's mother be dead, and its *hizánat* or custody has passed to the maternal grandmother, she cannot remove the child to her own city,† though the marriage had taken place there. Other women, than the grandmother, are like her in respect to the place of *hizánat.**

Principle. DLXXIX. When an *umm-i walad* has been emancipated, she has no right to take her child from the city† in which the father is residing.*

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* *Vide* Fatáwá Alamgíri, vol. i, page 731.—B. Dig., page 436.

† Arabic—'Balad,' which means a city, town, district, country, habitation or abode.

LECTURE XVII.

ON SALE.

CASES respecting sales and purchases made by the Mussulmáns in British India are almost invariably decided according to the Regulations and Acts of the present Government of the country. I shall, therefore, give here only those rules of sale as are peculiar to the Muhammadan law.

Sale is the exchange of property for property with the mutual consent of the parties.* Hence,— *Sale defined.*

Sale is of four kinds: commutation of goods for goods, of money for money, of money for goods, and of goods for money.†

DLXXX. Sale is contracted by declaration and acceptance (*a*), when these are expressed by two terms in the past tense (*b*).—Hidáyah, Arabic, vol. iii, page 1. *Principle.* *Essentials of sale.*

(*a*). The speech of the first of the contracting parties is termed declaration or tender (*ijáb*), and that of the other speaker, acceptance (*kabúl*).

(*b*). As when one of the two (contracting parties) says, "I have sold," and the other, "I have bought;" inasmuch as sale is the taking place of transfer.—Hidáyah, Arabic, vol. iii, page 1. *Example.*

So the expression "I am contented with this," or "I have given you for this," or "take it for this" used by him (*i.e.*, one of the contracting parties) means the same as his saying: "I have sold," or "I have bought;" because it indicates the meaning of it (*i.e.*, the sale), and it is the mean-

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* Hamilton's Hidáyah, vol. ii, page 360.

† Macn. M. L., Chap. iii, Princ. 3.

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ing to which regard is to be had in such contracts. Hence it may be contracted by mutual surrender (*tuáti*) of goods of great as well as of small value, and the same is valid by reason of mutual consent.—*Ibid.*

Principle. DLXXXI. If either of the contracting parties make the declaration of sale, then in the same meeting it is optional with the other to accept it if he chooses, or to reject it if he does not choose.

If either the buyer or seller should send a letter or a message to the other, the other (person) has the power of suspending his acceptance or refusal until he leave the place of meeting where he received such message or letter.—Hidáyah, vol. ii, page 362.

Principle. DLXXXII. When declaration and acceptance are absolutely expressed without any stipulations the sale becomes binding, and neither party has the power of retracting, unless in the case of a defect in the goods, or their not having been inspected.* *Ibid*, page 363.

Principle. Subject, &c., of sale. DLXXXIII. The subject and consideration of a sale must be determinate so as not to admit of future contention regarding the meaning of the contracting parties; but when the uncertainty is removed prior to the actual arrival of the period stipulated for the sale becomes again valid.†

DLXXXIV. The subject of the sale must also be in actual existence at the period of making the contract, so as to be susceptible of delivery, either immediately or at some future definite period.‡ Hence,—

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* These will be hereafter mentioned: *Vide* pages 499, 501.

† See Jámi-ur-Ramúz. Hidáyah, vol. ii, pages 449—451.

It is essential to the validity of every contract of sale that the subject of it and the consideration should be so determinate as to admit of no future contention regarding the meaning of the contracting parties.—Macn. M. L., Chap. iii, Princ. 13.

‡ *Vide* Hidáyah, vol. ii, pages 449 & 1516, and also the following page.

It is also essential that the subject of the contract should be in actual existence at the period of making the contract, or that it should be susceptible of delivery, either immediately or at some future definite period.—Macn. M. L., Chap. iii, Princ. 14.

DLXXXV. The sale of a thing not existing at the time is invalid, except in the form of *salam* sale (*c*), which is lawful in respect of particular articles (moveable), but even in *that* the quantity and quality of the subject must be ascertainable or ascertained, and the time of delivery specified.* *Principle.*

(*c*). In the language of the law '*salam*' means a contract of sale, causing an immediate payment of price, and admitting a delay in the delivery of the wares. A *salam* sale is authorized and rendered legal by a particular passage of the *Kurán*, and also by express declaration of the Prophet prohibiting any one from the sale of what is not in his possession, but authorising a *salam* sale. It is to be observed that *salam* sale is contrary to analogy, because of the non-existence of the subject of it, since it is a sale of a non-existent article, as the subject, in a *salam* sale, is merely the thing for which the advance is made, and that does not appear. Analogy, however, is abandoned in this instance, because of the text and tradition above cited.—Hidáyah, vol. ii, page 516.

DLXXXVI. When the article and price are both produced, the sale is complete without any stipulation of quantity or amount.† *Principle.*

For, the reference made to them is sufficient to ascertain the subjects of the contract, and does not leave room for any dispute.—Hidáyah, vol. ii, pages 363 & 364.

DLXXXVII. The conditions that are natural to a contract of sale are valid.‡ But it is illegal to insert any extraneous condition which may be advantageous only to one party or repugnant to the requisites of the contract, or which involve the subject of another contract, or by which the *Principle.*

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* *Vide* Hidáyah, vol. i, pages 516—542.

In a commutation of goods for goods, or of money for money, it is illegal to stipulate for a future period of delivery; but in a commutation of money for goods, or of goods for money, such stipulation is authorized.—Macn. M. L., Chap. iii, Print. 12.

† Hidáyah, vol. ii, pp. 363 & 364.

‡ See the following page.

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payment of the price is stipulated at a period not precisely known to both parties, or the date of its occurrence is uncertain, or which includes an unsaleable property in the sale of a saleable one, or which of itself is invalid. Whenever such a condition or conditions have been stipulated, it is not the condition but the sale itself is invalid.* If, however, the illegal condition as well as the uncertainty be removed previous to delivery the contract will hold good. *After* delivery, only the party stipulating for the illegal condition, or his representative, is empowered to annul the contract, but not the other party.—*Vide* Hidáyah, vol. ii, pages 446—452 & 455.

In a contract of sale there are five conditions. They are: 1—*Option of acceptance;* 2—*Condition of option;* 3—*Option of determination;* 4—*Option of inspection;* and 5—*Option from defect.* Of these, the two last arise out of the tansaction itself as the necessary results thereof.

Option of acceptance.

An option of acceptance is a liberty which either of the parties in a contract of sale has of withholding his acceptance after the tender of the other, until the breaking up of the meeting.†

A condition of option *(shart-i Khayár)* is where one of the parties stipulates a period *of two or three days* before he gives his final assent to the contract.

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dlxxxvii. It is unlawful to stipulate for any extraneous condition involving an advantage to either party, or any uncertainty which might lead to future litigation; but if the extraneous condition be actually performed, or the uncertainty removed, the contract will stand good.—Macn. M. L., Chap. iii, Princ. 16.

* In the case 'Mirza Bebee *v.* Toola Bebee' there is, however, a fatwá to the effect that the conditions in an invalid conditional sale are null and void, but do not invalidate the sale which is incorrect.—*Vide* Select Sudder Dewanny Adawlut Report, vol. iv, page 334.

Conditions of this nature are unlawful excepting where custom and precedent prevail over analogy.—Hidáyah, vol. ii, page 446.

† See *ante*, page 493.

DLXXXVIII. The stipulation of a condition of option on the part either of the seller or purchaser is lawful; and it may be stipulated to continue for three days or less, but it must not be extended beyond that term.*—*Vide* Hidáyah, vol. ii, page 380. *Principle.*

DLXXXIX. But the option is annulled by the purchaser's exercising any act of ownership, such as to take the property out of the *statu quo*†. *Principle.*

DXC. If a person possessing the right of option in a sale should die the sale is then complete, and the right of option becomes void and does not descend on his heirs.—Hidáyah, vol. ii, page 389. *Principle.*

DXCI. Where an option of dissolving the contract has been stipulated by the purchaser, and *Principle.*

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dlxxxviii. It is lawful for a person to make a purchase on this condition, that 'if in the course of three days he do not pay the price, the sale shall be null and void.' If, however, instead of three days he stipulate four, the sale is not valid according to Abú Hanífah and Abú Yusuf. All the doctors however agree that in case of such a stipulation having been made, if the purchaser in the meantime pay the price previous to the lapse of the third day, the sale is valid.—Hidáyah, vol. ii, page 382.

dxci. If the merchandize, where the stipulation of option is on the part of the purchaser, perish or be destroyed, the purchaser is in that case answerable for the price. In the same manner also if the goods receive an injury the purchaser is responsible for the price. It is otherwise where the merchandize perishes in the possession of the purchaser, when the option had been stipulated by the seller; for in this case the purchaser is answerable only for the value.‡—Hidáyah, vol. ii, pages 384 & 385.

* It is lawful to stipulate for an option of dissolving the contract; but the term stipulated should not exceed three days.—Macn. M. L., Chap. iii, Princ. 17.

† Macn. M. L., Chap. iii, Princ. 25.

‡ And not for the price set upon it in the contract.

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the property sold is injured or destroyed in his possession, he is responsible for the price agreed upon ; but where the stipulation was on the part of the seller, the purchaser is responsible for the *value* only of the property.

Principle.

DXCII. If a person in purchasing any article stipulate the option of another person in this case, provided either the purchaser or the possessor of the option confirm the sale, it is valid; or if either of them annul it, it becomes void.—Hidáyah, vol. ii, page 389.

Option of determination.

The option of determination is where a person having purchased one out of two or three homogeneous things stipulates a period to enable him to fix his choice on any of them.

Principle.

DXCIII. It is lawful for a purchaser to stipulate for a period to be enabled to determine which of the articles tendered for sale he will take. The option of determination extends to the choice of one article out of two or three, but not out of more (*d*).

Illustration.

(*d.*) If a person purchase one of two pieces of cloth for ten *dirams*, on the condition of his being at liberty for three days to determine on the particular piece which he may approve, such sale is valid; and the condition so stipulated is called an '*option of determination.*' A sale is in the same manner valid where a person purchases, with a reserve of option, one out of *three* pieces; but it is not lawful to purchase in that manner one out of *four* pieces.—Hidáyah, vol. ii, page 392.

Principle.

DXCIV. An option of determination may involve a condition of option, but the term for making the determination must not exceed three days. Of the articles referred to the purchaser's choice, one is the subject of sale, and the other or others are deposits: both of them may be returned in the case of a condition of option also being stipulated.—*Vide* Hidáyah, vol. ii, pages 393 & 394.

DXCV. If a person possessing an option of determination should die, his heir is empowered to return one of the articles.—Hidáyah, vol. ii, page 394. *Principle.*

For an option of determination necessarily descends to an heir, because of the implication of his property with that of another, whence he is not in his option of determination restricted to *three* days. If, on the contrary, a person recently possessed of a power of *option* die, his heir has no option as was before explained.—Hidáyah, vol. ii, page 394.

The option of inspection is the power which the purchaser of an unseen thing has of rejecting it after sight. Option of inspection.

DXCVI. If a person purchase an article without having seen it, the sale of such article is valid, (but) the purchaser after seeing it has the option of accepting or rejecting as he pleases.—Hidáyah, vol. ii, page 396. But,— *Principle.*

DXCVII. If a property is purchased by inspection of a part thereof, then the purchaser has no option left; but if purchased on inspection of a sample (where a sample suffices), he is, should the property not correspond with the sample, at liberty to recede, provided he has not exercised any act of ownership over the property.* *Principle.*

It is a rule that the sight of all the parts of the merchandize is not a necessary condition, because it is often impracticable to obtain it, and therefore it is sufficient to view *that* part whence it may be known how far the object of the purchaser will be obtained.—Hidáyah, vol. ii, page 399.

If a person look at the front of a house and then purchase it he has no *option of inspection*, although he should not have seen the apartments; and so also if a person

* Where the property has not been seen by the purchaser, nor a sample (where a sample suffices), he is at liberty to recede from the contract, provided he may not have exercised any act of ownership; if upon seeing the property it does not suit his expectation, even no option may have been stipulated.—Macn. M. L., Chap. iii, Princ. 26.

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view the *back* parts of a house, or the trees of a garden from without.—Hidáyah, vol. ii, page 400.

Principle.

DXCVIII. If a person having purchased an article unseen, should say "I am satisfied with it," in this case also he is at liberty after sight of it to reject it if he please.—Hidáyah vol. ii, page 397.

Because this option is implied in, and arises out of, the contract itself as a necessary result thereof.

Principle.

DXCIX. The seller of a thing not seen by him has, however, no option of receding from the contract unless expressly so stipulated.*

If a person sell a thing which he himself has not seen, he has no option of inspection.—Hidáyah, vol. ii, pages 327 & 397.

Principle.

DC. If a person having once seen an article should afterwards at a distant period purchase it, and the article at the time of purchase exist in the form and description in which he first saw it, he has not in this case any option (*e*), if, however, the purchaser should not recognise or know it to be the same article, he has in that case an option (*f*) ; or if, on the other hand, the nature of the article be changed he has an option (*g*).—Hidáyah, vol. ii, page 404.

(*e.*) Because he is possessed of a knowledge of the qualities from his former inspection.—*Ibid.*

(*f.*) Because under such circumstances his consent cannot be implied.—*Ibid.*

(*g.*) Because the qualities being changed it becomes in fact the same as if he had not seen it.—*Ibid.*

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* But though the property have not been seen by the seller, he is not at liberty to recede from the contract (except in a sale of goods for goods) where no option was stipulated.—Macn. M. L., Chap. iii, Princ. 27.

DCI. The inspection of an agent appointed to take possession of an article purchased is equivalent to the inspection of the purchaser; and consequently after the inspection of such agent the purchaser has no power of rejecting the article purchased, unless in a case of a defect.—Hidáyah, vol. ii, pages 400 & 401. LECTURE XVII. *Principle.*

DCII. The right of the option of inspection is not like a condition of option confined to a particular period: on the contrary it continues in force, until something take place repugnant to the nature of it.—*Ibid.*, page 398. *Principle.*

It is also to be observed that whatever circumstance occasions the annulment of an *optional condition* (such as a defect in the merchandise, or an exercise of right on the part of the purchaser), in the same manner occasions an annulment of the option of inspection.—*Ibid.*

DCIII. If a person possessing the option of inspection should die, the option in such case becomes null.—*Ibid.*, page 404. *Principle.*

For it is not a hereditament as has already been explained in treating of the condition of option.—*Ibid.*

The option from defect is the power which a purchaser has of dissolving the contract upon the discovery of a defect in the subject of his purchase. Option from defect.

DCIV. If a person purchase and take possession of an article, and should afterwards discover it to have been defective at the time of sale, it is at his option either to take it for the full price or to reject it (*h*). He is not, however, at liberty to retain the article and exact a compensation on account of the defect from the seller (*i*).*—Hidáyah, vol. ii, page 406. *Principle.*

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* A warranty as to freedom from defect and blemish is implied in every contract of sale. Where the property sold differs either with respect to quantity or quality, from what the seller had described it, the purchaser is at liberty to recede from the contract.—Macn. M. L., Chap. iii, Princ. 21 & 22.

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(*h.*) Because this option is implied in the contract, and is a warranty to freedom from defect and blemish subsequently discovered in the subject of sale.

(*i.*) Because in a contract of sale no part of the price is opposed to the quality of the article.—Hidáyah, vol. ii, page 406.

Principle. DCV. If, however, the purchaser at the time of sale or of taking possession be aware of the defect, and nevertheless knowingly and wilfully make the purchase or take possession, no option remains to him.

Because when he thus purchases or takes possession of the article, it is evident that he assents to the defect (*j*).—Hidáyah, vol. ii, pages 406 & 407.

(*j.*) Whatever may be the cause of diminishing the price amongst merchants is considered as a defect.—*Ibid*, page 407.

Principle. DCVI. If an article after being sold should receive a blemish in the hands of the purchaser, and the purchaser should afterwards learn that it had also a blemish at the time of the sale, he is in that case entitled to receive from the seller a compensation for the defect, but he is not permitted to return it to him.*—*Ibid.*, page 410.

Principle. DCVII. If a person purchase articles estimable by weight or by measure of capacity, and he afterwards discover the article to be in part defective, he is entitled in that case either to return the whole to the seller, or to retain the whole; but he has not the power of returning the defective part only.†—Hidáyah, vol. ii, page 422.

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* A purchaser, who may not have agreed to take the property with all its faults, is at liberty to return it to the seller on the discovery of a defect of which he was not aware at the time of the purchase, unless while in the hands of the purchaser it received a further blemish, in which case he is only entitled to compensation.—Macn. M. L., Chap. iii, Princ. 28.

† It is a general rule that if the articles sold are of such nature as not easily to admit of separation or of division without injury, and part of them

Because the unities of articles estimable by weight or by measure of capacity are considered as one individual, provided they be all of the same species.—Hidáyah, vol. ii, page 422. LECTURE XVII.

DCVIII. If after the purchase of the articles estimable by weight or measurement of capacity a part of them should prove to be the property of another, the purchaser is not (even) in that case allowed to return the remainder to the seller. This is where possession has been taken by the purchaser before a part of the subject is discovered to be the right of another.—*Ibid.* *Principle.*

For if the right of property of the other be discovered *previous* to the purchaser taking possession, he is in that case entitled to return the remainder, since a deviation from the contract takes place *previous* to the completion of the bargain.—*Ibid.*

DCIX. If the articles be not such as are estimable by weight or measurement of capacity,* then the purchaser is entitled to return the remainder to the seller.—*Ibid.* *Principle.*

There are some sales which are held to be abominable, some null and void, and some invalid.

It is abominable to enhance price of merchandize by the fictitious tender of a high price to anticipate or forestall the market, and to enhance price of grain in towns by or through persons selling for the farmers, as well as to make sales and purchases on Friday after the hour of prayer.—*Vide* Hidáyah, vol. ii, pages 460 & 461. Abominable sales and purchases.

DCX. A sale or purchase made in any of the abovementioned circumstances is held to be *Principle.*

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subsequently to the purchase be discovered to be defective, or to be the property of a third person, it is not competent to the purchaser to keep a part and to return a part, demanding a proportional restitution of the price for the part returned. In this case he must either keep the whole demanding compensation for the proportion that is defective, or he must return the whole demanding complete restitution of the price. It is otherwise where the several parts may be separated without injury.—Macn. M. L., Chap. iii. Princ. 33.

* But cloth for instance.—Hidáyah, vol. ii, page 422.

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abominable, but is upheld as a valid transaction (*k*)*, though prohibited to be made.

(*k.*) An abominable sale is such as is lawful both in its essence and quality, but attended with some circumstance of abomination.—Hidáyah, vol. ii, page 429.

Sales null and void.

A sale is null or void where the subject is not of an appreciable nature. That is to say,—

Principle.

DCXI. The sale of things which are neither saleable (*l*), nor property with *any* person (*m*) is null and void,† as also the sale made in exchange for the same.

(*l.*) Unsaleables are the slaves who have claims to freedom, such as umm-i-walad, mudabbar, and mukátab,‡ a bird in the air, fœtus in the womb, and so forth.—*Vide* Hidáyah, vol. ii, pages 430—432 *et seq.*

(*m.*) The sale of carrion, blood, or the person of a free man is null and void, in the same manner as a sale in return for those articles is null; such articles not constituting property with any person and being unsaleable.—Hidáyah, vol. ii, pages 428 & 429.

Invalid sales.

A sale is invalid where it is lawful with respect to its essence, but not with respect to its quality.—Hidáyah, vol. ii, page 428.

Principle.

DCXII. A contract of sale in exchange for a thing which does constitute property with Musalmáns, though it does with others, is merely invalid (*n*).

(*n.*) A sale in exchange for wine or pork is merely *invalid;* because the characteristic of sale does exist in these instances, as these articles are considered as property

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* The practices of forestalling, regrating, and engrossing, and of selling on Friday after the hour of prayer, are all prohibited, though they are valid.—Macn. M. L., Chap. iii, Princ. 34.

† A void sale is that which can never take effect; in which the articles opposed to each other, or one of them not bearing any legal value, the contract is nude.—*Ibid.*, Princ. 8.

‡ See *ante*, page 275.

with some descriptions of people, such as Christians and Jews; but they do not constitute property with *Mussulmáns*, and a contract comprehending these articles is therefore invalid.—Hidáyah, vol. ii, page 428.

The terms '*null*' and '*invalid*' are, however, used indiscriminately. Thus,—

DCXIII. A sale of forbidden things if for money is null; but if in the way of barter is invalid (*o*). *Principle.*

(*o.*) A sale of wine or pork, if in return for money, is *null*; and if in return for any other article (as cloth for instance) it is *invalid*, whence it is that the seller of pork or wine for *cloth* becomes the proprietor of such cloth, although the actual pork or wine do not become the property of the purchaser. The distinction in these cases is, that wine and pork are held by *Zimmís* to be property, whereas *Mussulmáns* consider them as articles from which no use can be derived, because the law has commanded the contempt of them, and prohibited all regard to them among *Mussulmáns*.—Hidáyah, vol. ii, pages 429 & 430. *Illustration*

DCXIV. The sale of any article which cannot be separated from its situation without injury, or of which the quality or existence cannot be ascertained, or the quantity of which can only be judged by conjecture, is invalid.—*Vide* Hidáyah, vol. ii, pages 433 & 434. *Principle.*

DCXV. In a sale that is null, the purchaser is not empowered to do any act with respect to the subject of the sale.—*Ibid.*, page 428. *Principle.*

DCXVI. In a case of invalid sale, the purchaser becomes proprietor of the article upon taking possession of it.—*Ibid.*, page 429. *Principle.*

DCXVII. In a sale of a land or of a house all fixtures are included, though they may not have been specified by the seller (*p*). *Principle.*

(*p.*) Fixtures comprise all such things as cannot be removed without actually deteriorating the main thing. Consequently,—

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If a person sell the place of his abode (*i.e.*, his house), the foundation and superstructure are both included in such sale, although they may not have been specified by the seller, because they are comprehended in the common acceptation of the term; and also because being joined to the ground in the nature of fixtures, they are considered as dependant parts of it.—Hidáyah, vol. i, page 372.

In a sale of land the trees upon it are included although they be not specified, because they are joined to it, in the same manner as foundation and superstructure in the preceding case.—*Ibid.* But,—

Principle. DCXVIII. In a sale of ground, the grain growing on it is not included unless particularly specified by the seller.*

Reason. Because it is joined to the ground, not as a *fixture* but for the purpose of being cut away from it, in the same manner as goods of any kind which may have been placed upon it.—Hidáyah, vol. ii, page 372.

In like manner,—

Principle. DCXIX. In the sale of a tree or trees the fruits then growing thereon belong to the seller unless specifically included in the sale.*

So also if a person should sell a tree on which fruit is growing the fruit belongs to the *seller,* unless it had been specifically included in the sale; because the Prophet has said "*If a person sell a date tree with fruit upon it the fruit belongs to the seller, unless the purchaser should have stipulated its delivery to him as a condition of sale.*" Besides, although the fruit be in fact a part of the tree, yet as it is intended to be plucked and gathered, and not to be suffered to hang on the tree, it is therefore the same as grain. It is to be observed, however, that in the sale of a tree with fruit, or of ground with grain upon it, the seller must be immediately desired to clear them away, and deliver the property to the purchaser; because in these

* By the sale of land nothing thereon which is of a transitory nature passes. Thus the fruit on a tree belongs to the seller, though the tree itself being a fixture appertains to the purchaser of the land.—Mach. M. L., Chap. iii, Princ. 23.

cases the property of the purchaser and seller being implicated together, it be comes incumbent on the seller to clear away what belongs to him; in the same manner as if he had placed any of his goods upon the ground, in which case the clearance of them would have been requisite.—Hidáyah, vol. ii, pages 372 & 373. LECTURE XVII.

DCXX. In a sale of land or house its rights and appendages or appurtenances are generally included (*q*). *Principle.*

(*q*.) The rights of a sale are things essentially necessary to the use of the subject of the sale, such as in the purchase of a house the right of passing through the road that leads to it. Appendages imply things from which an advantage is derived, but in a subordinate degree, such as a cook-room or a drain.—Hidáyah, vol. ii, page 501.

There is a peculiar kind of sale termed the '*bayi mukásah*,' which properly is barter: a sale in one shape and purchase in another shape.* In this country, however, the term '*bayi mukásah*' is generally understood to mean 'a sale in liquidation, in which the consideration due by the seller to the purchaser is set off against the thing sold.' *Bayi mukásah.*

The consideration above alluded to is generally a portion of the whole of the *daen-mahar* or unpaid dower of the seller's wife. Here recourse is generally had to *bayi-mukásah* as well as to *hibah bil-iwaz*† (a gift for an exchange).

DCXXI. The consideration of *bayi mukásah* as well as the subject of such sale is required to be specific and determinate so as to prevent any future dispute between the parties. *Principle.*

1. A Mussulmán disposes of *all* his property to his wife by a deed of *bayi mukásah*. According to law the estates, whether one, two, or more, that were specified in the deed of *bayi mukásah* will pass, and be conveyed in virtue of the deed, notwithstanding that the person who executed *that* deed may have farmed them out for a term of six years *Precedent.*

* *Vide* Hidáyah, vol, iii, page 31.

† This will be treated of in the Lecture on Gifts.

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before the execution of the deed; and according to the above contract, the purchaser (that is the wife) will be proprietor of the estates. As in a contract of *bayi mukásah* the law does not require seizin and possession, the deed of *bayi mukásah* will be legally valid, although the purchaser may be out of possession for several years.—Macn. Prec., M. L., Chap. ii, Case 10.

Precedent. 2. A husband sold to his wife, in exchange for the sum of fifteen thousand rupees of her claim of dower, all the lands and houses specified in the deeds, his household property, every thing that he acquired by inheritance, together with all the property that he might be possessed of up to the day of sale. Now the conditions of this contract are invalid, and it is null and void, because the property sold is not specified, and uncertainty legally vitiates a contract of sale. The heirs of the seller are therefore at liberty to set aside the contract.—Macn. Prec., M. L., Chap. ii, Case 9.

Principle. DCXXII. The law does not prescribe any particular form for a sale. It may either be made verbally or executed in writing. The proposal or tender and acceptance of the parties being the only essential to effect a sale.*

Principle. DCXXIII. In a commutation of goods for goods, or money for money, immediate delivery is requisite to the validity of the sale; but in a commutation of money for goods, or of goods for money, a future period of delivery may be stipulated for.†

Principle. DCXXIV. A lunatic in his lucid intervals, the natural or legal guardian of a minor, and a minor with the consent of such guardian, are competent to enter into a contract of sale as well as any owner, adult and sane.

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* See *ante*, page 493.

† In a commutation of goods for goods, or of money for money, it is illegal to stipulate for a future period of delivery, but in a commutation of money for goods, or of goods for money, such stipulation is authorized.—Macn. M. L., Chap. iii, Princ. 12.

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ON PREEMPTION.

Shufá or right of preemption is a power of possessing property which has been sold to another by paying a price equal to that settled or paid by the purchaser.* *Shufá* defined.

DCXXV. The right of preemption applies not to moveable but to immoveable property (*akár*†), divisible or indivisible (*a*), and can be exercised when the latter is transferred in any shape for a consideration (*b*), even as a grant or gift for a consideration expressed,‡ or in a compromise (*c*). *Principle.*

(*a.*) A privilege of *shufá* takes place with respect to immoveable property, notwithstanding it be incapable of division, such as a bath, a mill, or a private road. According to *our* tenets the grand principle of *shufá* is the conjunction of property, and its object to prevent the vexation arising from a disagreeable neighbour; and this reason is of equal force whether the thing be divisible or otherwise. Hidáyah, vol. iii, page 591.

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* The original meaning of *Shufá* is conjunction.—Durr-ul-Mukhtár, page 697.

In law it is a right to take possession of a purchased parcel of land for a similar (in kind or quality) of the price that has been set on it to the purchaser.—B. Dig., page 471.

† See the case cited at the end of this Lecture.

‡ The right of preemption takes effect with regard to property, whether divisible or indivisible; but it does not apply to moveable property, and it cannot take effect until after the sale is complete, as far as the interest of the seller is concerned.—Macn. M. L., Chap. iv, Princ. 3.

The right of preemption takes effect with regard to property sold, or parted with by some means equivalent to sale, but not with regard to property the possession of which has been transferred by gift, or by will, or by inheritance; unless the gift was made for a consideration, and the consideration was expressly stipulated, but preemption cannot be claimed where the donor has received a consideration for his gift, such consideration not having been expressly stipulated.—Macn. M. L., Chap. iv, Princ. 2.

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It is observed in the abridgment of *Kadúrí* that *shufá* does not affect even a *house* or *trees* when sold separately from the ground on which they stand. This opinion (which is also mentioned in the Mabsút) is approved; for as buildings and trees are not of a permanent nature they are therefore of the class of *moveables*.—Hidáyah, vol. iii, pages 591 & 592.

(*b, d.*) The privilege of *shufá* is not admitted in the case of grants, unless when the grant is made for a consideration, in which case it is in effect ultimately a sale. Still, however, the privilege of *shufá* cannot be admitted unless both parties have obtained possession of the property transferred to them by the terms of the grant (nor if the thing granted on either side be an indefinite part of any thing;) for a grant on condition of a return is still a grant in its *beginning*, as has been already explained in treating of gifts. It is further to be observed that the privilege of shufá cannot be admitted, unless the return be expressed as a condition on making the grant; for if it be not so expressed, and the parties give to each other reciprocal presents, these presents on both sides are held as pure *grants*, although each of them having met with a requital of his generosity, neither is allowed the power of retreating.—Hidáyah, vol. iii, pages 594 & 595.

(*c.*) If a defendant compromise a suit by resigning or making over a house to the plaintiff, after having either denied his claim or acknowledged it, or refused to answer it, the right of *shufá* is established with respect to the house; because as the plaintiff here accepts the house in consideration of what he conceives to be his right, he is therefore [in adjudging the right of *shufá* against him] dealt with according to his own conceptions.—Hidáyah, vol. iii, page 594. So—

Principle. DCXXVI. The right of preemption does not take effect with respect to the property transferred

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dcxxv, dcxxvi. Among its conditions are the following:—1st. There must be a contract of exchange, that is, a sale or something that comes into the place of a sale, otherwise there is no right of preemption. So that the right does not arise out of gift, charity, inheri-

by a grant or gift without consideration *expressly stipulated* (*d*). It does not also take effect to the property made over as a hire or reward, or as a compensation for *khulá*, or as a dower (*e*), though it takes effect with respect to the property sold in order to pay a dower (*f*).

(*e.*) When a man acquires a property in lands for a consideration, the privilege of *shufá* takes place with respect to it. The privilege of *shufá* cannot take place relative to a house assigned by a man as a dower to his wife, or by a woman to her husband as the consideration on which he is to grant her as a divorce, or which is settled on a person as his hire or reward.—Hidáyah, vol. iii, page 592.

(*f.*) If a man marry a woman without settling on her any dower, and afterwards settle on her a house as a dower, the privilege of *shufá* does not take place, the house being here considered in the same light as if it had been settled on the woman at the time of the marriage. It is otherwise where a man sells his house in order to discharge his wife's dower *either proper* or *stipulated*, because here exists an exchange of property for property.—Hidáyah, vol. iii, page 593.

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tance, or bequest. But if the gift be a *hibah báshart-ul-iwaz*, or with a condition that something shall be given in exchange for it, and mutual possession is taken, the right arises. If possession is taken by one of the parties and not by the other, there is no right of preemption according to 'our three masters.' And if a mansion is given without any condition for an exchange, but the donee gives another mansion in exchange for it, there is no right of preemption with regard to either. But preemption is due on a mansion which is the exchange for a composition, whether the composition be after an acknowledgment or a denial of the claim, or silence has been observed with regard to it; and it is also due on the mansion compounded for, when the composition is after an acknowledgment of the claim, though it is not due if the composition have taken place after a denial of the claim. 2nd.—There must be an exchange of property for property. 3rd.—The thing sold must be *akár*, or what comes within the meaning of it, whether the *akár* be divisible, or indivisible, as a bath, or well, or a small house.—Fatáwá Alamgírí, vol. v, page 249.—B. Dig., pages 471 & 472.

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Principle. DCXXVII. The right of preemption does not take effect with respect to a sale made under condition of option* (*g*), though it takes effect with the *purchase* made under such condition (*h*).

(*g.*) If a man *sell* his house under a condition of option,* the privilege of *shufá* cannot take place with respect to that house, the power reserved by the seller being an impediment to the extinction of his right of property, but when he relinquishes that power the impediment ceases, and the privilege of *shufá* takes place, provided the *Shafí* prefer his claim *immediately.* This is approved.—Hidáyah, vol. iii, page 595.

(*h.*) If, on the contrary, a man *purchase* a house under a condition of option, the privilege of *shufá* takes place with respect to it; for such a power reserved by the *purchaser* is held, in the opinion of all the learned, to be no impediment to the extinction of the *seller's right* of property; and the right of *shufá* is founded and rests upon the extinction of the *seller's* right of property, as has been already explained.—*Ibid.*

Principle. DCXXVIII. The right of preemption does not apply to a transfer made under an invalid sale; on the contrary, the maker of such sale so long as he has not delivered the property to the purchaser can himself exercise his right of preemption over the transfer of an adjacent property. But after his delivering to the purchaser the subject of such sale, the latter is vested with the right of the adjacent property; and it is not divested of him and revested in the seller so long as the latter does not resume the property transferred by him under the invalid sale.

The privilege of *shufá* cannot take place regarding a house transferred by an invalid sale, either before or after the purchaser obtaining possession of it; for, before the purchaser obtains possession, the house belongs as usual to

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* See *ante*, pages 496 & 497.

the seller, and his right of property is not extinguished; and after he has obtained possession there is still a probability that the bargain may be dissolved, since the law admits the dissolution of a sale in a case of invalidity, in order to obviate such invalidity an effect which could not be produced if the privilege of *shufá* were allowed.—Hidáyah, vol. iii, page 596.

If the house adjacent to one which has been transferred by an invalid sale be sold whilst the one so transferred is still in the possession of the seller, he [the seller] is the *Shafi* of the adjacent house, because of the continuance of his right in the other.—Hidáyah, vol. iii, page 597.

DCXXIX. But when the seller's right in the property transferred under an invalid sale is entirely cut off and established in the purchaser, then of course the right of preemption can be exercised. *Principle.*

If, however, the purchaser put an end to the possibility of the dissolution of any particular act, such as by erecting buildings on the ground or the like, the privilege of shufá may take place, since the impediment then no longer exists.—Hidáyah, vol. iii, page 596.

The proper time for making the demand of preemption in the case of an invalid sale is not that of the purchase, but when the seller's right is entirely cut off.*—B. Dig., page 482.

DCXXX. The right of preemption once relinquished cannot afterwards be resumed.† *Principle.*

If a man purchase a house, and the *Shafi* relinquish his privilege, and the purchaser afterwards reject it in virtue of an option of inspection, or a condition of option,‡ or by a decree of the magistrate in virtue of an option from defect,§ the *Shafi* is not entitled to claim his privilege, whether the man had ever taken possession of the house or not.—Hidáyah, vol. iii, page 598.

* I suppose on possession being taken with the seller's permission when the purchaser becomes the proprietor.—Note by Mr. Baillie.

† See, however, page 536. ‡ See *ante*, pp. 496 & 599.

§ See *ante*, page 501.

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Principle.

DCXXXI. If, on the contrary, the purchaser reject the house on discovering a blemish in it after having taken possession without the decree of the Kází, or if the seller and purchaser agree to dissolve the contract, the privilege of *shufá* is established to the *Shafi.*

Because in those instances the rejection or dissolution is a *breaking off* with respect to the seller and purchaser, inasmuch as they are their own masters, and moreover *will* and *intend* a breaking off: yet with respect to others it is not a *breaking off*, but is rather in effect a *new sale*, since the characteristic of sale, namely, *an exchange* of property for property with the mutual consent of the parties exists in it; and as the *Shafi* is *another*, it is therefore a *sale* with respect to him, whence his right of *shufá* must be admitted.—Hidáyah, vol. iii, page 598.

Principle.

DCXXXII. The right of preemption (*shufá*) belongs in the first place to the co-sharer in the property; secondly, to a sharer in the rights and appurtenances of the property; and thirdly, to the neighbour (*i*).*

(*i.*) The right of *shufá* appertains 1—to a partner in the *property* of the land sold; 2—to a partner in the *immunities* and *appendages* of the land (such as the right to *water* and to *roads*); and 3—to a *neighbour.* The right of *shufá* in a partner is founded on a precept of the Prophet, who has said—"*The right of Shafá holds in a partner who has not divided off and taken separately his share.*" The establishment of it in a *neighbour* is also founded on a saying of the Prophet—"The *neighbour of a house has a superior right to that house, and the neighbour of lands has a superior right to those lands; and if he be absent, the seller must wait his return, provided, however, that they both participate in the same road;*" and also—"*A neighbour has a right superior to that of a stranger in the lands adjacent to his own.*"—Hidáyah, vol. iii, page 562. Hence—

* The right of preemption may be claimed by all descriptions of persons. There is no distinction made on account of difference of religion. The

DCXXXIII. Where the co-sharer in the property itself is a claimant, the sharer in the rights and appurtenances is not entitled to the privilege of preemption, and where he is a claimant, his claim is preferable to that of the neighbour (*j*). *Principle.*

(*j*.) A partner merely in the road and rivulet, or a neighbour, cannot be entitled to the privilege of *shufá* during the existence of one who is a partner in the property of the land, for his is the superior right as has been already shown.—Hidáyah, vol. iii, page 564.

A person who is the joint proprietor of only a part of the property sold, (such as a partner in a particular *room* or *wall* of a house) as he has a right superior to one who is neighbour to that particular part, so likewise has he a right superior to one who is a neighbour to the rest of the house. This is an approved maxim of Abú Yusuf; for the conjunction holds stronger in the case of a person who is a joint proprietor of only a *part* of the house, than in that of one who is merely a neighbour. It is necessary that the road or rivulet, the joint participation in which gives a claim to the privilege of *shafá*, be *private*.—Hidáyah, vol. iii, page 565.

When within a mansion, which is situate in a street without a thoroughfare, and which has several owners, there is a house belonging to two persons, and one of them sells his

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dcxxxiii. A *sharík* (or partner in the substance of a property) is preferred to a *khalít* (or partner in its rights as of water or way*), and a *khulít* is preferred to a neighbour.—Fatáwá Alamgírí, vol. v, page 457. —B. Dig., page 476.

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following persons may claim the right of preemption in the order enumerated: a partner in the property sold, a partner in its appendages, and a neighbour. All rights and privileges which belong to an ordinary purchaser belong equally to a purchaser, under the right of preemption.—Macn. M. L., Chap. iv, Princ. 4—6.

* Hidáyah, vol. iv, page 1 (413).

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share in it. The right of preemption belongs first to the partner in the house, then to the partners in the mansion, and next to the people in the street, who are all alike. If all these give up their right it belongs to the *mulásik*, or contiguous neighbour, by whom is meant the neighbour behind the mansion who has a door opening into another street.*

A mansion belonging to two persons is situate in a street which has no thoroughfare, and one of the partners sells his share to a stranger: the right of preemption belongs first to the partner in the house, then to the partner in a party wall, then to all the people in the street equally, and then to the neighbour in the mansion behind that which is sold.*

Principle. DCXXXIV. A companion (that is a *khalít*) in a way is preferred for preemption to a companion in a channel of water, when the place of the channel is not his property.*

So that if a mansion is sold in which one person has a way, and another a channel of water, the former has the right of preemption rather than the latter.*

Principle. DCXXXV. The neighbour whose connection with the property is closer than that of another neighbour has a preferable right (*k*).

(*k*.) If a house be sold is situated in a short lane, shut up at one end, communicating through another lane, shut up also at one end, but of greater extent, in this case the inhabitants of the *short* lane only are entitled to the privilege of *shufá;* whereas if a house situated in the *long* lane be sold, the inhabitants of *both* lanes are so entitled. The reason of this is, that the right of egress and regress in the short lane is participated only by its own inhabitants, whereas the right in the *long* lane appertains equally to the inhabitants of both; as has been already explained under the head of "*Duties of the Kází.*" The same rule also holds good in the case of a small rivulet issuing out of another.—Hidáyah, vol. iii, page 566.

* Fatáwá Alamgírí, vol. v, pp. 259, 260.—B. Dig., pp. 477, 478, 479, 480.

DCXXXVI. But if the first *shafi*, or claimant by right of preemption, relinquish his right or claim, the second is entitled to enforce his own, and on his giving up his own right, the *shafi* in the third degree can exercise his own right (*l*). LECTURE XVIII. *Principle.*

(*l.*) If a partner in the property of the land relinquish his right of *shufá*, it devolves next to him who is a partner in the road; and if he also relinquish his right, it falls to the *Jár mulásik*, or person whose house is situated at the back of that which is the object of *shufá*, having the entry to it by another road.—Hidáyah, vol. iii, page 564.

When the owner of a large mansion in which there are several houses sells one of them, or sells any other known part of the mansion, the right of preemption belongs to the neighbour of the mansion on whichever side he may be. But if the preemptor gives up his right, and the purchaser afterwards sells the house, or the particular part, the right of preemption belongs only to the neighbour of the house or part which has now become a separate or independent property, and is no longer deemed to be a part of the mansion.* Illustration.

(*m.*) Take the case of a mansion which is situate in a street without a thoroughfare, and belongs to two persons, one of whom sells his share. The right of preemption belongs, in the first place, to the other partner in the mansion. If he surrenders his right, it belongs to the inhabitants of the street equally, without any distinction between those who are contiguous and those who are not so; for they are all *khalíts* in the way. If they all surrender the right it belongs to a *mulásik*, or contiguous neighbour. If there be another street leading from this street, and having no passage through it, and a house in it is sold, the right of preemption belongs to the inhabitants of this inner street, Further illustration.

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dcxxxv, dcxxxvi. If the *sharík* gives up his right, the *khalít* is entitled; and among the *khalíts* the special is preferred to the general. If the *khalít* gives up his right the neighbour is entitled. This is the answer of the Záhir-ur-Rawáyit, and it is correct.*

* Fatáwá Alamgírí, vol. v, pp. 256, 257 & 259.—B. Dig., pp. 476—480.

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because they are more specially intermixed with it than the people of the other street. But if a house in the outer street be sold, the right of preemption belongs to the people of the inner as well as to those of the outer street, for the intermixture of both in the right of way is equal. If the street were open with a passage through, and a mansion in it were sold, there would be no right of preemption except for the adjoining neighbour. In like manner when there is a thoroughfare, which is not private property between two mansions (that is when they are situate on opposite sides of the way), and one of them is sold, there is no preemption, except for the adjoining neighbour. If the road be private property, it is the same as if it were no thoroughfare. A thoroughfare which does not give the right of preemption is a street that the people residing in it have no right to shut. In like manner as to a small channel from which several lands or several vineyards are watered, and some of the lands or some of the vineyards watered by it are sold: all the partners are preemptors without any distinction between those who are and those who are not adjoining. But if the channel be large, the right of preemption belongs to the adjoining neighbour. There is some difference of opinion as to the distinction between a small and a large channel.—Fatáwá Alamgírí, vol. v, page 259.—B. Dig., pages 476 & 477.

Principle. DCXXXVII. If one of the parties (having equal rights) relinquish his own right, it devolves on the others, and is participated equally among them (*n*).—*Vide* Hidáyah, vol. iii, page 567.

(*n*.) If one of them should cause his right to drop, the whole belongs, *per capita*, to those that remain. B.—Dig., p. 494.

Principle. DCXXXVIII. Several individuals claiming upon equal ground have equal claims without regard to the *extent* of their several properties or rights.

'When there is a plurality of persons entitled to the privilege of *shufá*, the right of all is equal, and no regard is paid to the extent of their several properties.—Hidáyah, vol. iii, page 566.

Illustration. Preemption according to 'us' is *per capita*, or by heads. When a mansion is owned by three persons, one of

whom has a half, another a third, and another a sixth, and the owner of the half having sold his share, it is claimed by the other two under their right of preemption, it is to be decreed between them in halves. Or if the owner of the sixth should sell his share, it is to be divided between the other two in halves.*

DCXXXIX. If any of the parties possessing the right of preemption happen to be absent, then the entire right of preemption can be claimed and exercised by those who are present: should the absentees afterwards appear and claim their shares they are entitled to the same (*o*). *Principle.*

(*o*.) If one is absent, decree is to be given, *per capita*, to those who are present. But if after decree of the whole to one who is present, a second should appear, half is to be decreed to him; and if a third should appear, decree is to be given to him for a third of what is in the hands of each of the other two.*

(*o*.) If some of the partners happen to be absent, the whole of the *shufá* is to be decreed equally amongst those who are present; for it is a matter of uncertainty whether those who are absent would be inclined to demand their right; and the rights of those who are present must not be prejudiced on a mere uncertainty. If, however, the *Kází* should have decreed the whole of the *shufá* to one who is present, and an absentee afterwards appear and claim his right, the *Kází* must decree him the half; and so likewise if a third appear, he must decree him one-third of the shares respectively held by the other two, in order that thus an equality may be established amongst them.—Hidáyah, vol. iii, page 567.

DCXL. The right of preemption does not operate until the conclusion of the sale of the pro- *Principle.*

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dcxl. The right of shufá is not established until demand has been regularly made in the presence of witnesses; and it is requisite that

* Fatáwá Alamgíri, vol. v, page 276.—B. Dig., page 494.

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perty, nor till after a regular demand has been made for it in the presence of witnesses.

The privilege of *shufá* is established after the sale, for it cannot take place until it be manifest that the proprietor is no longer inclined to keep his house, and this is manifested by the sale of it. It is therefore sufficient, in order to prove the sale and establish the privilege of *shufá*, that the seller acknowledge the sale, although the person said to be the buyer deny it.—Hidáyah, vol. iii, page 568.

Principle.

DCXLI. Property claimed by right of preemption does not go to the claimant except by the surrender of the purchaser, or under a decree of a judge.

When the demand has been regularly made in the presence of witnesses, still the *Shafi* does not become proprietor of the house until the purchaser surrender it to him, or until the magistrate pass a decree, because the purchaser's property was complete, and cannot be transferred to the *Shafi* but by his own consent, or by a decree of a magistrate.—Hidáyah, vol. iii, pages 568 & 569.

Different kinds of demands or claims to *shufá*.

Claims to *shufá* or preemption are of three kinds. Of these the first is termed—"*Talab-i mawásabat*" (immediate claim), the second—'*Talab-i takrír wa ish-hád*' (claim by affirmation and by invoking witness), the third—"*Talab-i tamlík* (claim for possession) or *Talab-i khasúmat* (claim by litigation)."—*Vide* Hidáyah, vol. iii, pages 569, 571 & 572.—Fatáwá Alamgírí, vol. v, page 276.—B. Dig., page 481.

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it be made as soon as possible after the sale is known; for the right of *shufá* is but a feeble right, as it is the disseizing another of his property merely in order to prevent apprehended inconveniences. It is therefore requisite that the *Shafi* without delay discover his intentions by making the demand, which must be done in the presence of witnesses, otherwise it cannot be afterwards proved before the *Kázi*.—Hidáyah, vol. iii, page 568.

By '*Talab-i mowásabat,*' or immediate demand, is meant that—

DCXLII. The person possessing the right of preemption should assert his claim the moment he is apprized of the sale being concluded, or else his right is invalidated (*p*).—*Vide* Hidáyah, vol. iii, page 569. *Principle.*

(*p.*) And this it is necessary that he should do, insomuch that if he make any delay his right is thereby invalidated; for the right of *shufá* is but of a *feeble* nature as has been already observed; and the Prophet, moreover, has said "*The right of shufá is established in him who prefers his claim without delay.*"—Hidáyah, vol. iii, page 569.

DCXLIII. It is not material in what words the claim is preferred; it being sufficient that they imply a claim.—*Ibid*, page 570. *Principle.*

Thus if a person say—"I have claimed my *shufá*," or "I *shall* claim my *shufá*," or "I *do* claim my *shufá*," all these are good; for it is the meaning, and *not* the style or mode of expression, which is here considered.—*Ibid.* Illustration.

There is some difference as to the words in which the demand should be expressed; but the correct opinion is that it is lawful in any words that intelligibly express the demand. So that if he should say—"I have demanded," or "I take the mansion by preemption," or "do demand

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dcxlii. By '*Talab-i Mowásabat*' is meant that when a person who is entitled to preemption has heard of a sale, he ought to claim his right immediately on the instant (whether there is any one by him or not,*) and when he remains silent without claiming his right, it is lost.—Fatáwá Alamgírí, vol. v, p. 267.—B. Dig., page 481.

dcxliii. It is necessary that the person claiming this right should declare his intention of becoming the purchaser immediately on hearing of the sale, and that he should, with the least practicable delay, make affirmation by witness of such his intention, either in the presence of the seller or of the purchaser, or on the premises.—Macn. M. L., Chap. ii, Princ. 7.

* Eháyah, vol. iv, page 249.

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preemption" it would be lawful. But if he were to say to the purchaser "I am thy *Shafí*, or preemptor," it would be viod.*

Principle.

DCXLIV. If the *Talab-i-takrír wa ish-hád*, or demand by affirmation with invoking witness, could not be made immediately after *Talab-i mowásabat* (immediate demand), the former is to be made as soon after that as may be practicable (*q*).—*Vide* Hidáyah, vol. iii, page 571.

(*q*.) The second mode of claim to *shufá* is termed the '*Talab-i takrír wa ish-hád*,' or claim by affirmation and taking to witness, and this also is requisite; because evidence is wanted in order to establish proof before the magistrate; and it is probable that the claimant cannot have witnesses to the *Talab-i mowásabat*, as that is expressed immediately on intimation being received of the sale. It is therefore necessary afterwards to make the *Talab-i ish-hád wa takrír*, which is done by the *Shafí* taking some person to witness,—either against the seller, if the ground sold be still in his possession, — or against the purchaser,—or upon the spot regarding which the dispute has arisen; and upon the *Shafí* thus taking some person to witness his right of *shufá* is fully established and confirmed. The reason of this is, that both the buyer and seller are opponents to the *Shafí* in regard to his claim of *shufá*; the one being the possessor, and the other the proprietor of the ground; and the taking evidence on the ground itself is also valid; because it is *that* to which the right relates. If the seller have delivered over the ground to the buyer, the taking evidence against him is not sufficient, he being no longer an opponent; for having neither the possession nor the property he is as a stranger. The manner of claim by affirmation and taking to witness is, the claimant saying—"Such a person has bought such a house, of which I am the *Shafí*; I have already claimed my privilege of *shufá*, and now again claim it: be therefore witness thereof." (It is reported from Abú Yusuf that it is requisite the *name* of the thing sold, and its particular boundaries, be specified, because a claim is not

* Fatáwá Alamgírí, vol. v, page 267.—B. Dig., pp. 481 & 482.

valid unless the thing demanded be precisely known.) Hidáyah, vol. iii, pages 571 & 572. LECTURE XVIII.

(*q.*) *Talab-i mowásabat*, or immediate demand, is first necessary; then the *Talab-i ish-hád*, or demand with invocation (of witness), if, at the time of making the former, there was no opportunity of invoking witnesses, as, for instance, when the preemptor, at the time of hearing of the sale, was absent from the seller, the purchaser and the premises. But if he heard it in the presence of any of these, and had called on witnesses to attest the immediate demand, it would suffice for both demands, and there would be no necessity for the other.—Fatáwá Alamgíri, vol. v, page 268.—B. Dig., page 484.

DCXLV. If upon the claimant's asserting his right and claiming the disputed property in the manner abovementioned, the party then in possession thereof be he the seller or purchaser, be willing to deliver the property to the claimant, he is to take it upon the same terms as the purchaser was willing to purchase, or he has actually purchased, it (*r*). If the property was sold for a price payable at a distant period the claimant may either wait until that period is expired, and take the property for the same price; or he may take it immediately on paying the price; but he cannot claim any respite for payment, which had not been given to the purchaser (*s*).—*Vide* Hidáyah, vol. iii, pages 582 & 583. *Principle.*

(*r.*) If a man sell a house for a certain quantity of goods or effects, the *Shafi* is entitled to take it for the *value* of such *effects*; for *effects* are amongst the things denominated *Zát-ul-kayim*, or things which being estimable are compensable by an equivalent in money. If, on the other hand, a man sell a house for a compensation in wheat, silver, or any other article estimable by measure or weight the *Shafi* may take it for an equal quantity of the same article; because these are of the class of *Zát-ul-Imsál*, or things compensable by an equal quantity of the same species.—Hidáyah, vol. iii, page 582.

If a man sell a piece of ground for another piece of ground, in this case as each piece of ground is the price

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for which the other is sold, the *Shafi* of each piece is entitled to take it for the value of the other, land being of the class of *Zát-ul-kayim*, or things compensable by an equivalent in money.—Hidáyah, vol. iii, page 583.

(*s.*) If a house be sold for a price payable at a distant period the *Shafi* may either wait until that period be expired, and then take the house for the same price, or he may take it immediately on paying the price in ready money: but he is not entitled to take it immediately and demand a respite to the period settled by the purchaser.—Hidáyah, vol. iii, page 583.

When a person purchases it must necessarily be for something that belongs to the class of similars, that is, things which are estimated by measure of capacity or weight, or approximates of sale; or something that belongs to the class of dissimilars, such as a piece of cloth, or a slave, or the like. In the former case, the preemptor takes the subject of sale at a similar of the price, in the latter, he takes it for its value according to the general body of the learned.—Fatáwá Alamgírí vol. v, page 273.—B. Dig., page 488.

Principle. DCXLVI. If the seller should have received the price, the *Shafi* may take the house (*i.e.*, property) for the amount set forth as the price by the purchaser (*t*).

(*t.*) And here the allegation of the seller is of no weight or credit for having received the price, the sale, as far as relates to him, is finally concluded, and he becomes only as a stranger; the dispute then lying betwixt the purchaser and the *Shafi*, regarding which we have already been very explicit in a former part of this section.—Hidáyah, vol. iii, pages 580 & 581.

Principle. DCXLVII. If the claimant be not apprised of the seller's having received the price, and the seller should allege a certain price received by him on sale of the property, then the claimant is entitled to have the property for the price mentioned (*t*).

Illustration. If the *Shafi* be not apprized of the seller's having received the price, and the seller should say—"I have sold

the property for one thousand *dirams*, which I have received,"—in this case the *Shafi* is entitled to take the property for one thousand *dirams;* for, as the beginning of the seller's speech, in which he acknowledges the sale, creates the *Shafi's* right of *shufá*, the subsequent sentence, in which he asserts his having received the price, as tending to extinguish that right which he has himself created, must not be admitted. But if the seller should say—"I have sold the ground and received the price," and then should add "which was one thousand *dirams*," his evidence with respect to the amount of the price cannot be admitted, because by the prior acknowledgment of his having received the price, he becomes like a stranger, and has no further concern or interest in the matter.—Hidáyah, vol. iii, page 581.

DCXLVIII. If the seller abate a part of the price to the purchaser, the Shafi (claimant by right of preemption) is entitled to the benefit of such abatement, but if the seller after the conclusion of the sale remit the whole of the price to the purchaser, the Shafi is not allowed to avail himself of such indulgence. *Principle.*

The reason of this distinction is, that an abatement of a part is an act connected with, and referring to, the original bargain or sale; and the *Shafi* is entitled to the benefit of it, because that sum which remains after deducting the abatement is the price; whereas an *entire remission* has no connexion with the original bargain. In the same manner also, if the seller abate a part of the price, *after* the *Shafi* has become seized of his *shufá* property, he [the *Shafi*] is entitled to the benefit of such abatement, and accordingly receives back the amount abated by the seller to the purchaser.—Hidáyah, vol. iii, pages 581 and 582.

DCXLIX. If, on the contrary, the purchaser, after the bargain is concluded, agree to an augmentation of the price in favor of the seller, the Shafi is not liable for such augmentation. *Principle.*

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Because his privilege of *shufá* is established for the price originally settled; and if any subsequent augmentation were admitted to operate with respect to him, it would be a loss to him; whereas, on the contrary, any subsequent *abatement* is a *benefit*. Analogous to this case of *augmentation* is that formerly stated, in which it was remarked that if a man make a purchase for a certain price, and afterwards renew the purchase of the same thing, and settle a large price, the *Shafi* is not prejudiced by such augmentation, but is entitled to his shufá for the price first agreed upon.—Hidáyah, vol. iii, page 582.

Principle. DCL. Should the seller or purchaser object to the claimant's right the latter can prefer his claim to the court of justice,* and sue the purchaser if the property has been taken possession of by him; otherwise the seller.†

If the Shafi bring the seller into court whilst the house is still in his possession, he (the *Shafi*) may commence his litigation against him, and the seller may retain the house in his own possession until he receive the price from the *Shafi*.—Hidáyah, vol. iii, page 575.

The third mode of claim to *shufá* is termed "*Talab-i khasúmat*," or claim by litigation, which is performed by the *Shafi* petitioning the kází or judge to command the purchaser to surrender up the land to him.—Hidáyah, vol. iii, page 572.

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* The above preliminary conditions being fulfilled, the claimant of preemption is at liberty at any subsequent period to prefer his claim to a court of justice.—Macn. M. L., Chap. iv, Princ. 8.

† If an agent on behalf of another purchase ground, the Shafi must sue the agent. If, however, the agent have delivered over the ground to his constituent, the Shafi must not institute his suit against the agent, (as he is neither the proprietor nor the possessor) but against his constituent; for the agent then stands as the seller, and his constituent as the purchaser; and when (as has been already explained) the seller delivers up the ground to the purchaser, the *Shafi's* suit is against the latter.—Hidáyah, vol. iii, page 576.

If the agent of a person who is absent sell ground on account of his constituent the *Shafi* may claim his right and obtain the ground from the agent, provided it be in his possession. The same rule also holds in the case of an executor authorized to sell lands.—*Ibid.*

If the *Shafi* delay making claim by litigation, still his right does not drop according to Hanífah, *such also is the generally received opinion and decrees pass accordingly.**—There is likewise one opinion recorded from Abú Yúsuf to the same effect.—*Ibid.*, p. 573.

The Fatáwá Alamgírí includes *Talab-i khasúmat* (demand by litigation) in the *Talab-i tamlík*, and says,—"By *Talab-i tamlík* or demand of possession is meant the bringing of the matter before the judge that he may decree the property to the claimant by virtue of his right of preemption."†

If he neglects to litigate the matter for a sufficient reason, such as sickness, imprisonment, or the like, and cannot appoint an agent, the right of preemption is not annulled. And though he should neglect to do so without a sufficient reason the right would not be annulled according to Abú Hanífah and Abú Yusuf, also by one report. And this is the manifest doctrine of the sect, the fatwá being in accordance with it.* But according to Muhammad and Zufr and Abú Yusuf, also by another report if he should call witnesses to his demand, yet should neglect to sue for a month without a sufficient excuse the right of preemption is annulled, and decisions are also given according to this opinion.†

DCLI. The claimant is not obliged to deposit the price in the court on preferring his claim. It is sufficient that he pays it upon his taking possession‡ under the court's decree, but if he does not then make the payment, the purchaser (if already in

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* Much difference of opinion prevails to this point. It seems equitable that there should be some limitation of time to bar a claim of this nature, otherwise a purchaser may be kept in a continual state of suspense. According to Abú Hanífah and another tradition of Abú Yusuf there is no limitation as to time. This doctrine is maintained in the Fatáwá Alamgírí, in the Muhít-us-Sarakhsí, and in the Hidáyah; and it seems to be the most authentic and generally prevalent opinion. But the compilers of the Fatáwá Alamgírí admit that decisions are given both ways.—Note by Sir William Macnaghten.

† Fatáwa Alamgírí, vol. v, p. 268.—B. Dig., pp. 484, 488.

‡ Or when the Court may think proper.—*Vide* Gholam Nubby Chowdhry *v.* Gour Kissor Rai. Sudder Dewanny Adawlut Reports, vol. i, page 350.

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possession) can retain the property until the price be paid.

It is not incumbent on the preemptor to produce the price at the time of making his claim. Nay, he may lawfully contest the matter without producing the price during the sitting of the judge. But after the decree has been pronounced he should then produce it. Though, if he should delay to deliver the price after he has been directed to deliver it, his right is not cancelled without any difference of opinion.*

The *Shafí* may litigate his claim to *shufá* although he do not produce in court the price of the ground in dispute.—Hidáyah, vol. iii, page 575.

When, previous to the Shafí producing the price, the kází has commanded the purchaser to deliver up the ground (to the Shafí), still he may retain it in his own hand until the price be brought to him.†—Hidáyah, vol. iii, page 575.

If the Shafí delay to pay the price to the purchaser *after* the Kází has ordered him, still his privilege of shufá is not invalidated; for it has become firmly established by the litigation and the decree of the Kází.—*Ibid.*

Principle. DCLII. When there are several persons who have together a right of preemption to a mansion, each of them before resignation or decree has a right in the whole; and that if one of them resigns his right before taking possession and before decree, the others may take the whole.* But,—

Principle. DCLIII. After resignation, or after decree, the right of each one in that which has been resigned

* Fatáwá Alamgírí, vol. v, pages 273, 275.—B. Dig., pages 488 & 494.

† The first purchaser has a right to retain the property until he has received the purchase-money from the claimant by preemption, and so also the seller in case where delivery may not have been made.—Macn. M. L., Chap. IV, Princ. 9.

by or decreed to his fellow is made void. So that when there are two preemptors to a mansion, and the judge having decreed it between them, one of them surrenders his share, the other cannot take the whole.*

DCLIV. When one preemptor is stronger than another, that is has a prior claim, and the judge passes a decree in his favor, the right of the weaker is made void. So that when there is a partner and a neighbour, and the former surrenders his right of preemption before a decree has been pronounced in his favor the neighbour may take up the right, but if the surrender does not take place till after the decree the neighbour's right is extinguished.*

DCLV. When a preemptor who is absent has a better right than one who is present, and decree is given for the whole to the one who is present, after which the absent one appears, as, for instance, if the first were a *khalít* and the second only a neighbour, the judge is to cancel his decree in favor of the one who was present, and to decree for the whole in favor of him who was absent.*

DCLVI. If the kází decree in favor of the *Shafí* at the time when he has not yet seen the property in dispute, he [the Shafí] has an option of inspection, and if any defect be afterwards discovered in it he has an option from defect,† and

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dclvi. When the judge has made a decree in favor of the preemptor, or the purchaser has made delivery, all the legal effects of sale are established between them, such as the options of inspection and defect.*

* Fatawá Alamgíri, vol. v, pp. 275 & 276.—B. Dig., pp. 490 & 494.

† See *ante*, pp. 499 & 501.

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may, if he please, reject it, notwithstanding the purchaser should have excepted such defect from the bargain, or, in other words, should have exempted the seller from responsibility for such defect.—Hidáyah, vol. iii, pages 576 & 577.

Because, as the transfer of property by right of *shufá* is the same as a transfer of property by sale, the *Shafí* has, therefore, under both the above circumstances, the power of rejection in the same manner as any other purchaser; and this power in the *Shafí* is not destroyed by the purchaser having seen the property, or having so exempted the seller; for he [the purchaser] was not deputed by the *Shafí*, and his act, of course, does not affect the *Shafí's* power of rejection.—Hidáyah, vol. iii, page 577.

DCLVII. If the intermediate purchaser has made any improvements in the property, the claimant by right of preemption must either pay their value, or cause them to be removed.* But if he has sown seed in the land, the preemptor must wait for the ripening of the crops, after which he will take the land at the full price.

If the purchaser of ground subject to a claim of *shufá* erect buildings or plant trees upon it, and the *kází* afterwards order the ground to be delivered to the *Shafí*, it in this case rests with him [the *Shafí*] either to take the ground, together with the building or trees, paying the value of both, or to oblige the purchaser to remove them. This is the doctrine of the *Záhir-ur-Rawáyit.*—Hidáyah, vol. iii, page 586.

When a purchaser has erected buildings, or planted trees, or sown seed in land, and a preemptor then appears and a decree is given in his favor, the purchaser is obliged

* Where an intermediate purchaser has made any improvements in the property the claimant by preemption must either pay for their value, or cause them to be removed; and where the property may have been deteriorated by the act of the intermediate purchaser, he (the claimant) may insist on a proportional abatement of the price; but where the deterioration has taken place without the instrumentality of the intermediate purchaser, the claimant by preemption must either pay the whole price, or resign his claim altogether.—Macn. M. L., Chap. iv, Princ. 10.

to take up the buildings and trees in making delivery of the land to him, except that when the doing so would be injurious to the land, the preemptor has an option, and may take the land at its price, with the buildings and trees at their value as taken up. This is according to the Záhir-ur-Rawáyit; but with regard to seed all are agreed that the preemptor cannot oblige the purchaser to take it up, but must wait for the ripening of the crops, and that the land is then to be taken at the full price. Then when the land is left in the hands of the purchaser, it is left without hire or rent.—Fatáwá Alamgírí, vol. v, page 279.—B. Dig., page 496. See *Ibid*, page 498.

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DCLVIII. In the case of the disputed property having been deteriorated by the purchaser, the claimant is entitled to proportional deduction in the price, but when the deterioration has not been caused by the purchaser, the claimant must either pay the whole price, or resign his claim.

If the purchaser wilfully break down the erections, the *Shafi* may either resign his claim, or may take the area of ground for a proportionable part of the original price; but he is not entitled to the ruins, because they are become a separate property, and are no longer appendages of the ground; and the right of *shufá* extends only to the ground, and to things so attached to it as to be *appendages*.—Hidáyah, vol. iii, page 589.

If a man purchase a house or garden subject to a claim of *shufá*, and the building (owing to some unforeseen calamity) be destroyed, or the trees decay, it rests in the option of the *Shafi* either to resign the house or garden, or to take it and pay the full price; because, as buildings or trees are mere appendages of the ground (whence it is that they are included in the sale of land without any particular mention being made of them), no particular part of the price is set against them, unless where they have been wilfully destroyed by the purchaser, in which case it is lawful for him [the purchaser] to sell the appendages so destroyed, and make a profit by them, exclusive of the full price of the ground. It is otherwise when one-half of the ground is inundated; for in such case the half of the thing itself being destroyed, the *Shafi* may take the remainder, paying only half of the original price.—Hidáyah, vol. iii, page 589.

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When a man has purchased a mansion, and has pulled down the buildings, or a stranger has done so, and a preemptor then comes to claim his right, the price is to be divided according to the value of the buildings as they were while standing, and the value of the cleared space, and the preemptor is to take the land at so much of the price as corresponds to the latter.*

If the buildings are burnt down, or swept away by an inundation, so as to leave nothing in the hands of the purchaser, the preemptor must take the land at the full price.*

Principle. DCLIX. If the purchaser disposes of the purchased mansion before it is taken by the preemptor (*u*), the preemptor may take the premises and cancel all those acts of disposal by the purchaser.*

(*u*). As, for instance, by gift or delivery, or by letting to hire, or converting it into a *masjid*, or place of worship, and allowing people to worship in it, or into a cemetery or burying in it.*

Principle. DCLX. After obtaining possession of the property (the subject of preemption), if the preemptor has made any improvements in it by erecting buildings, planting trees, and so forth, and then if it be proved that the land belonged to a person other than the seller or the intermediate purchaser, in such case, the preemptor is entitled to recover his purchase-money from the party (be it the seller or the intermediate purchaser), from whom he had taken the property, and is at liberty to remove what was done by him upon the property or land in question, but he could not recover from either party the value of the improvements made by him.†

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* Fatáwá Alamgírí, vol. v, pp. 279, 280, 282.—B. Dig., pp. 496 & 497.

† But a claimant by preemption having obtained possession of, and made improvements in, the property, is not entitled to compensation for such improvements, if it should afterwards appear that the property belonged to a third person. He will, in this case, recover the price from the seller, or from the intermediate purchaser (if possession had been given), and he is at liberty to remove his improvements.—Macn. M. L., Chap. iv, Princ. 11.

If a *Shafi* having obtained possession of his *shufá* land erect buildings or plant trees upon it, and it afterwards appear that the land was wrongfully sold being the property of another, the *Shafi* recovers the price from the *seller* where he had taken the land from *him*, or from the *purchaser* where he had taken it from *him*, because it is evident that it was wrongfully taken. He is not, however, entitled to recover from either party the value of his buildings or trees, but is at liberty to carry them whenever he pleases.—Hidáyah, vol. iii, page 588.

The right of preemption is rendered void in two different ways after it has been established. One of these is termed '*ikhtiyárí*' (voluntary), and the other '*zarúr*' (necessary). The first is of two kinds—'*sarih*' (express), and '*dalátatan*' (by implication).*

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DCLXI. The right of the preemption is rendered void *expressly* when the preemptor relinquishes in plain terms (*v*), and it is rendered void *by implication* when anything is found on the part of the preemptor that indicates his acquiescence in the sale (*w*).—*Vide* B. Dig., page 499.

(*v.*) When the preemptor uses such expressions as these: "I have made void the *shufá*," or "I have caused it to drop," or "I have released you from it," or "I have surrendered it to you," whether the preemptor is or is not aware of the sale, provided, however, that it has actually taken place.*

(*w.*) As, for instance, when knowing the purchase, he has omitted, without a sufficient excuse, to claim his right (either by failing to demand it on the instant, or by rising from the meeting, or taking to some other occupation, without doing so, according to the different reports of what is necessary on the occasion); or in like manner when he has made an offer for the house to the purchaser, or has asked him if he will give it up to him; or has taken it from him on hire, or in *muzárat* and all this with knowledge of the purchase.*

* Fatáwá 'Alamgírí, vol. v, pp. 282 & 283.—B. Dig., page 499.

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(*v.*) If a man purchase a house and the *Shafi* relinquish his privilege, and the purchaser afterwards reject it in virtue of an option of inspection, or a condition of option,* or by a decree of the magistrate in virtue of an option from defect,* the *Shafi* is not entitled to claim his privilege whether the man had ever taken possession of the house or not; and so likewise if the man before taking possession reject the house on discovering a blemish without a decree of the *kází*; for, as, under all those circumstances, the rejection is a dissolution of the bargain, the house reverts to its original proprietor; and the privilege of *shufá* is not established but on the notification of a new sale.—Hidáyah, vol. iii, page 598.

(*w.*) If the *Shafi* omit to procure evidence of his having claimed his *shufá* on being informed of the sale, notwithstanding his ability so to do, his right of *shufá* is void, because of his neglecting to claim it. In the same manner also if he prefer the *Talab-i mowásabat*, or immediate claim, and omit the *Talab-i Ish-had wa takrír*, notwithstanding his ability to make it, his right of *shufá* is void as has been already explained.—Hidáyah, vol. iii, page 599.

Principle. DCLXII. The right of preemption is rendered void *necessarily* when the preemptor has died after the two demands,† and *before* taking the thing under the preemption (*x*). But it is not made void by the death of the purchaser; and the preemptor may, accordingly, assert his right and take the subject of sale from his heirs (*y*).—*Vide* Fatáwá Alamgírí, vol. v, page 238.—B. Dig., page 500.

(*x.*) If the *Shafi* die his right of *shufá* becomes extinct. *Sháfí* maintains that the right of *shufá* is hereditary. The compiler of the *Hidáyah* remarks that this difference of opinion obtains only where the *Shafi* dies

* See *ante*, pp. 496 & 500.

† "Or before demand" (Durr-ul-Mukhtár, page 704); and the same is implied in the reasons assigned in Hidáyah (see Translation, vol. iii, page 601). The omission in the text may perhaps be accounted for by the title of the chapter, which has reference only to extinctions of right *after it has been established*, and it is not established till demand.—Note by Mr. Baillie.

after the sale, but previous to the *kází* decreeing him the *shufá;* for if he die after the *kází* has decreed his *shufá* without having paid the price, or obtained possession of the property sold, his right devolves to his heirs, who become liable for the price.—Hidáyah, vol. iii, page 600.

(*y.*) If the purchaser die, yet the right of *shufá* is not extinguished, for the *Shafí* who is entitled to it still exists, and no alteration has taken place in the reasons or grounds of his right. The house, therefore, is not to be sold for the payment of the purchaser's debts, or disposed of according to his testament; and if the *kází* or executor sell it in order to discharge the debts of the estate, or if the purchaser have bequeathed it, the *Shafí* may render any of these transactions void and may take the house; for the right of the *Shafí* is antecedent, whence he has the power of annulling the purchaser's acts with respect to the property even during his lifetime. Hidáyah, vol. iii, page 601.

DCLXIII. The right of preemption (*shufá*) is invalidated by the preemptor's compromising his privilege of *shufá* for a compensation; it is also invalidated by his selling the subject of his claim before the *kází's* decree.

If the *Shafí* agree to compound his privilege of *shufá* for a compensation he thereby invalidates his right and is not entitled to the compensation; for he has no established *right* or *property* in the place in dispute, but merely a power of insisting on becoming the proprietor in exclusion of the purchaser; and as, therefore, a renunciation of *shufá* (understood in renouncing all right to disturb the proprietor in the enjoyment of the property) is not a subject of exchange, it follows that no consideration can be demanded for it.—Hidáyah, vol. iii, page 599.

If the *Shafí* previous to the decree of the *kází* sell the house from which he derives his right of *shufá*, the reasons or grounds of his right being thereby extinguished, the right itself is invalidated, notwithstanding he be ignorant of the sale of the house to which it related; in the same manner as where a man relinquishes his *shufá* without

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being informed of the sale, or acquits a person of a debt without knowing the amount; in the first of which cases the right of *shufá* is invalidated, and in the second the debtor is acquitted. It is otherwise where the *Shafi* sells his house upon a *condition of option*;* for as, whilst a power of option remains in the seller his property is not totally extinguished, it follows that the ground of *shufá* (namely, a *conjunction of property*) still continues.—Hidáyah, vol. iii, pages 601 & 602.

When the preemptor has compounded his right for an exchange, the right is made void and the exchange must be returned, for the right is not fixed (mukarrar) and inherent in a thing, but merely a naked right to take possession of it. It is therfore not a fit subject for exchange.*

DCLXIV. When the preemptor has different rights of preemption, the extinction of one does affect the other.

When the preemptor is both a partner and a neighbour and sells his share on which his right in the former capacity was founded, he may still assert his claim on the grouud of neighbourhood.*

DCLXV. The right of preemption is however resumed when the claimant had relinquished it upon misinformation of the amount or the kind of price, or of the purchaser, or of the property sold.

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dclxv. When the preemptor has surrendered his right on misinformation as to the amount or the kind of the price, or the person to whom the property has been sold, it is to be considered if his purpose would or would not have been changed had he been correctly informed; and if it would not the surrender is valid and the right extinguished; but if it would the surrender is not valid and the right may still be asserted. When the preemptor has been informed that the price was

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* Fatáwá Alamgíri, vol. v, page 284.—B. Dig., page 502.

If intelligence be brought to the *Shafi* of the house which is the subject of his right being sold for one thousand *dirams*, and he relinquish his right of *shufá*, and afterwards learn that the house was sold for a less price, his resignation is not binding, and he may still assert his right of *shufá*.—Hidáyah, vol. iii, page 602. Illustration.

If news be brought to the *Shafi* that one-*half* of the house is sold, and he resign his right, and it afterwards appear that the *whole* was sold, he must still in such case claim his *shufá*, since it is to be supposed that he at first resigned his right in order to avoid the inconvenience of a partner, whereas if the whole be sold there is no occasion for his being subject to any such inconvenience. If, on the contrary, the case be reversed, that is to say, if he first learn that the *whole*, and afterwards that only the *half* is sold, he is not (according to the *Záhir-ur-Rawáyit*) entitled to claim his *shufá*, because his resignation of the *whole* comprehended his resignation of *a part*.—Hidáyah, vol. iii, page 604.

If the *Shafi* be first informed that a particular person is the purchaser, and thereupon resign his *shufá*, and he afterwards learn that the purchaser was another person, he is still entitled to his *shufá*.—Hidáyah, vol. iii, page 603.

DCLXVI. If the *Shafi* (or preemptor) act as agent of the seller, and sell the house on his behalf, his right of *shufá* is thereby invalidated; whereas if he act as agent for the *purchaser*, and purchase the house on his behalf, his right of *shufá* Principle.

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a thousand *dirams*, and has thereupon surrendered his right, but subsequently ascertains that it was a hundred *dínárs*, he retains his right if the value of the hundred *dínárs* be less than that of a thousand *dirams*; while if such is not the case the surrender is valid. When he has been told that the purchaser was such an one, and has thereupon surrendered his right, but, subsequently, ascertains that he was a different person, the right survives.—Fatáwá Alamgírí, vol. v, page 285.—B. Dig., page 501.

If he surrenders on information that only half of a mansion has been sold, when in fact the sale has been of the whole, his right survives.—*Ibid.*

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is not invalidated. In short, it is a rule, that if a person as agent for another, sell the land, &c., of that other, the right of *shufá* in both is thereby invalidated, whereas if an agent (such as a *manager* for instance) purchase land, or so forth, the right of both continues unaffected.—Hidáyah, vol. iii, page 602.

Principle. DCLXVII. When a preemptor wishes to take one part of a purchased property without another, and the part is not distinct or separate (*z*), he cannot do so without any difference of opinion. He must, therefore, take or leave the *whole*, whether the purchase be by one person from one, or by one from two or more persons. So that he cannot take the share of one or two sellers, whether the purchaser had or had not taken possession according to Záhir-ur-Rawáyit which is correct.*

(*z.*) As, for instance, when the purchased property is a single mansion, the preemptor desires to take that part of it which abuts on his own premises without the remainder.*

Principle. DCLXVIII. If a property be purchased by several persons, the claimant by right of preemption may take the whole or the portion of any one of them; but if the property be sold by several persons and purchased by a single person, then the claimant must either take the whole or relinquish the whole.

If five persons purchase a house from one man the *Shafi* may take the proportion of any one of them. If, on

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dclxviii. When, however, two persons purchase from one person, the preemptor may take the share of one of the purchasers according to them all, whether before or after possession.—Fatáwá Alamgírí, vol. v, pp. 282 & 283.—B. Dig., pp. 282 & 283.

* Fatáwá Alamgírí, vol. v, page 272.—B. Dig., page 492.

the contrary, one man purchase a house from five persons, the *Shafi* may either take or relinquish the whole, but is not entitled to take any particular share or proportion. The difference between these two cases is that if, in the latter instance, the *Shafi* were allowed to claim a part, it would occasion a discrimination in the bargain to the purchaser, and be productive of very great inconvenience to him; whereas, in the former instance, the *Shafi* being merely the substitute of one of the five purchasers no discrimination in the bargain is occasioned.—Hidáyah, vol. iii, page 606.

DCLXIX. When one man purchases from one by a single bargain, several *manzils* or houses in a street in which there is no thoroughfare; and the preemptor desires to take one of them. It has been said that if his right of preemption is based on partnership in the way, he cannot take a part of the purchased property, for this would be to divide the bargain without any necessity; but if the right be based on neighbourhood, and he is neighbour only to the house which he wishes to take, he may lawfully take it alone.—Fatáwa Alamgírí, vol. v, page 272.—B. Dig., page 492. *Principle.*

DCLXX. If part of the purchased property be separate and distinct from the other part of it, as for instance when two mansions are purchased by one bargain, the preemptor cannot take one of them without the other, if he is *Shafi* or preemptor of the two together. He must either take or leave both; and that according to 'our' three masters, whether the mansions are adjacent to, or separated from, each other, and whether they are situate in one or two cities.* *Principle.*

DCLXXI. If a father or guardian resign the right of *shufá*, such resignation is lawful according *Principle.*

* Fatáwá Alamgírí, vol. v, pp. 272 & 273.—B. Dig., pp. 492 & 493.

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to Abú Yusuf and Hanífah.—Hidáyah, vol. iii, page 608.

The learned in the law observe there is the same difference of opinion in the case of a father or guardian omitting to make the claim of *Shufá* on being apprized of the sale of the house; or an agent resigning the claim before the tribunal of the kází.—*Ibid.*

Principle. DCLXXII. When a person who has purchased a village (*karíah*) in which there are houses, and trees and palms, has sold the trees and buildings, and the purchaser from him has cut down some of the trees, and pulled down some of the buildings, after which the preemptor appears, he is entitled to the land and so much of the trees and buildings as have not been cut or pulled down, and to a deduction from the price corresponding to those that have been cut or pulled down, which he is not at liberty to take.*

There are devices by which the right of preemption may be easily as well as legally evaded. Thus,—

Where a man sells the whole of his house, excepting only the breadth of one yard extending along the house of the *Shafi*, he [the Shafí] is not in this case entitled to claim his privilege, because of his neighbourhood being thus cut off. This is a device by which the *Shafi* may be disappointed of his right; and it is still the same if the seller grant the intervening part of his house as a free gift to the purchaser and put him in possession of it.—Hidáyah, vol. iii, page 604.

For other devices† see Fatáwá Alamgírí, vol. v, page 301. —B. Dig., pages 504—506.

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* Fatáwá Alamgírí, vol. v, page 282.—B. Dig., page 498.

† There are many legal devices by which the right of preemption may be defeated. For instance, where a man fears that his neighbour may advance such a claim he can sell all his property, with the exception of that part immediately bordering on his neighbour's; and where he is apprehensive of the claim being advanced by a partner, he may, in the first instance, agree with the purchaser for some exorbitant nominal price, and, afterwards commute that price for something of an inferior value; when if a claimant by preemption appear he must pay the price first stipulated, without reference to the subsequent commutation.—Macn. M. L., Chap. iv, Princ. 13.

APPENDIX.

In a recent decision of the High Court of Calcutta, the Arabic word '*akár*'* has been construed to mean 'houses and small enclosures of land.' This decision cites almost all the important cases on the subject, and is in itself so important that it is considered proper to quote it *in extenso*. The same is as follows :—

The 8th of July 1870.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, L. S. Jackson, E. Jackson, and W. Markby, *Judges*.

Cases Nos. 1660 and 1663 of 1869.

Special Appeals from a decision passed by the Judge of Bhagulpore, dated the 18*th of March* 1869, *affirming a decision of the Moonsiff of Monghyr, dated the* 24*th of August* 1868.

Shah Mahomed Hossein (Plaintiff), *Appellant, versus* Shah Mohsun Ali (Defendant), *Respondent.*

Case No. 298 of 1869.

Application for review of judgment passed by the Hon'ble Justices J. P. Norman and E. Jackson on the 19*th of July* 1869, *in Special Appeal No.* 158 *of* 1869.

Chutternath Jha *alias* Jhinga Jha (Respondent), *Petitioner, versus* Bhojoo Singh (Appellant), *Opposite Party.*

The right of preemption on the ground of vicinage does not extend to estates of large magnitude, but only to houses, gardens, and small parcels of land.

A partner, not in a house or small enclosure, but in a considerable estate, has a right, according to Mahomedan law, to preemption when one of his co-sharers in such estate sells his share to a stranger.

Cases Nos. 1660 and 1663 were referred to the Full Bench by Loch and Hobhouse, JJ., with the following remarks :—

Hobhouse, J.—These cases had best, we think, be referred to the Full Bench. The question is when the claim for preemption is founded on vicinage, will that claim extend to any property of the description of a share in a village ?

* See *ante*, page 509.

Understanding that a cognate case has been referred to the Full Bench by Mr. Justice Norman and Mr. Justice E. Jackson, let these cases be also referred to the same Full Bench.

Loch, J.—I concur.

Case No. 298 was referred to the Full Bench by Norman and E. Jackson, JJ., with the following remarks :—

Norman, J.—We refer this case to a Full Bench for the consideration of the following points :—

By several recent decisions of this Court, it has been established that under Mahomedan law, the right of preemption possessed by a neighbour extends only to houses and small parcels of land, and not to considerable estates.

In two recent cases, 11 W. R., p. 71, and 10 W. R., p. 314, it has been held that the right of a shareholder to preemption exists, whether the parcel of land sold and in respect of which the claim is made be large or small.

There are many prior decisions to the same effect. But we doubt whether it can be shown that, under the Mahomedan law, there is any ground for that distinction ; whether under that law there is any case in which a partner has a right of preemption in which, if he fails to exercise it, a neighbour may not also claim to exercise such right.

The question is whether, according to Mahomedan law, a partner not in a house or small enclosure, but in a considerable estate consisting of a mouzah with five *puttees*, has a right to preemption, when one of his co-sharers in such estate sells his share to a stranger.

The judgment of the Full Bench was delivered as follows by—

Couch, C.J.—The question referred to the Full Bench in Special Appeals No. 1660 and No. 1663 of 1869 is as follows :—"When the claim for preemption is founded on vicinage, will that claim extend to any property of the description of a share in a village?"

It appears that there are a great many decisions of the courts of this country in which an opinion has been expressed, that when the claim for preemption is founded on vicinage, the right is limited to property of small extent.

In 1856, the Judges of the Agra Sudder Court, when considering the right of preemption on the ground of vicinage, said (page 396)—"There can be no doubt that in the Mahomedan law, lands are included amongst the articles concerning which *shufá* or preemption operates; but it may admit of question whether entire mehals or estates were intended, or merely parcels of lands, gardens and the like. The

latter view appears to be supported by a passage in the Hidáyah which quotes a saying of the Prophet to the effect that shufá affects only houses and gardens." This case was referred to by a Full Bench of this court in 1863 (Sutherland's Special Number, page 143) where the Judges say that they would not on the mere ground of vicinage support a claim of preemption in respect of an entire estate.

In 2 W. R., p. 261, we find the court says:—"Plaintiff claims on the ground of vicinage alone. Now it is clear that, if the Mahomedan law does not bear out his claim, there is no other custom which does; and we are of opinion that, even supposing the Mahomedan law in all its integrity to apply to the case, the plaintiff's claim cannot be supported. A claim founded on joint tenancy is, no doubt, good; but as regards vicinage not accompanied by joint tenancy the law is unfavorable and construes strictly such claims. The authorities are even at variance as to their admissibility; but assuming it to be settled that some claims on mere vicinage are good, the principle seems to be that, when either houses or small holdings of land make parties, in fact, such near neighbours as to give a claim on the ground of convenience and mutual servience, the claim in right of preemption will lie; but this principle does not apply to large estates which are not, in fact, such that any real vicinage of the proprietors results."

This decision is approved of and adopted in 8 W. R., p. 310, and again in the same volume at page 413. In a case reported at page 356 of the 10th Volume of the W. R., Mr. Justice Loch says:—"Looking at the Chapter on shufá in the Hidáyah, the right appears to be limited to parcels of land, houses, &c., and does not contemplate the right to purchase a separate estate, because a part of it is contiguous with that of the Shafi. It is true that a person may have a bad neighbour as a zemindar, and so suffer as much vexation from him as from a bad neighbour next door or holding the next field; but still it appears to me that the law was intended to prevent vexation to holders of small plots of land, who might be annoyed by the introduction of a stranger among them." I think I would apply the ruling laid down in the judgment of the court quoted above to the present case, and allow the judgment of the Lower Court to stand; for the property to which the right of preemption is claimed, is a separate estate paying revenue to Government.

Mr. Justice Mitter says:—"The property in dispute is an estate paying revenue to Government, and I am not prepared to say that this case is not governed by the decision relied upon by the respondent."

These cases are all referred to, and concurred in, in a case reported in 11 W. R., p. 251.

The Arabic word, used to describe the subject-matter of preemption is '*akár*.' There has been a considerable discussion during the argument of this case upon what is the true meaning of that word. The

Counsel for the appellant has contended that it applies to estates of all descriptions and magnitude; that there is under the Mahomedan law no limit whatever; that the right exists whether the estate sold be large or small, provided that any portion of it is contiguous to the estate of the party claiming the preemption, and that the decisions of this court which put a limit on the right in this respect are wrong.

We are, however, not prepared to say that there is not some ground for the limit which this court has, in the above cases, put upon the right even on the words of the text of the law itself. It is probably impossible now to discover the precise meaning which was put upon the word *akár* at the time when the Arabic texts were composed. Looking not merely at the words used in the Hidáyah, but at the illustrations given in the second and third chapters of the same book, at the state of society when the law was first uttered, and at the inconveniences against which it was probably directed, the better opinion might be that *akár* should be construed to mean houses and small enclosures of land. But we rely rather on the uniform series of decisions, which very clearly recognize that the right of preemption on the ground of vicinage does not extend to estates of large magnitude, but only to houses, gardens, and small parcels of land. We do not consider that there is any thing before us which would justify us in disturbing that long series of decisions.

In Review No. 298 of 1869, on Special Appeal No. 158 of 1869, the question is referred to us in the following terms:—"By several recent decisions of this court, it has been established that under the Mahomedan law the right of preemption possessed by a neighbour extends only to houses and small parcels of land, and not to considerable estates. In two recent cases (11 W. R., p. 71, and 10 W. R., p. 314) it has been held that the right of a shareholder to preemption exists whether the parcel of land sold and in respect of which the claim is made be large or small. There are many prior decisions to the same effect. But we doubt whether it can be shown that under the Mahomedan law there is any ground for that distinction; whether under that law, there is any case in which a partner has a right of preemption in which, if he fails to exercise it, a neighbour may not also claim to exercise such right.

The question is, whether, according to Mahomedan law, a partner not in a house or small enclosure, but in a considerable estate consisting of a mouzah with five *puttees*, has a right to preemption when one of his co-sharers in such estate sells his share to a stranger.

In the case referred to in 10 W. R., p. 314, the question does not (according to the report) appear to have been raised; but in the other case (11 W. R., p. 71) the question was raised, and the Judges (Kemp and Glover, JJ.,) say that they find nothing in the Mahomedan law which restricts the right of preemption of a coparcener to small parcels of land.

We find that this decision is in accordance with the law as recognized from a very early period. In a case which occurred as early as the year 1811 (reported in I Select Reports, page 350) the right of preemption was claimed and established by a shareholder in respect of a share in an entire pergunnah. In another case which occurred two years after (reported in Volume II, Select Reports, page 85) the right was applied to a whole mouzah.

Again, in 1840 (VI Select Reports, page 277) we find it applied to a whole village, which, from the price, was evidently a considerable one. In 1857 (Sudder Decisions, page 454) it was applied to a talook; and again in 1858 (Sudder Decisions, page 1754) to a village.

It is true that in none of these cases was any question raised as to the extent of the right; but the absolute silence of the reports upon any such limit is now contended for, notwithstanding the numberless instances in which the right of preemption must have been claimed by a partner in respect of a share in a large estate, strongly shows that for a very long period no such limitation has been supposed to exist.

It was urged upon us that the two lines of decision as to a neighbour and a partner could not be reconciled; that the right was given by the Arabic texts to both in the same terms; and that if the right was limited in the one case it ought also to be so in the other, the only respect in which the three classes of claimants differ being the right of priority. Now, if we are to look exclusively at the language of the law as it appears in the Hidáyah there is certainly ground for this contention. But we think that we should not be justified, merely for the sake of logical consistency, in overruling what appears to have been the law consistently applied in this Court for a great number of years, and never until very recently questioned.

This view of the Mahomedan law of preemption in the case of partners has, no doubt, been acted upon in a great number of cases and is in conformity with modern usage; and to disturb it now would be to disturb a great many titles. Moreover, the distinction between the case of a neighbour and the case of a partner does undoubtedly proceed upon a very sound principle, *viz.*, that the right should be co-extensive with the inconvenience which it is intended to avoid.

The result is that we answer the question in Special Appeals Nos. 1663 and 1660 of 1869 in the negative, and the question in Review, No. 298 of 1869, in Special Appeal No. 158 of 1869 in the affirmative.—Weekly Reporter, Vol. XIV, Full Bench Rulings, page 1.

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